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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 561

SWEENY INDEPENDENT SCHOOL DISTRICT, et al,
Petitioners

v.

MILDRED HARKLESS, et al, *Respondents*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO._____

SWEENY INDEPENDENT SCHOOL DISTRICT, et al,
Petitioners

v.

MILDRED HARKLESS, et al, *Respondents*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 2, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit and the dissenting opinion of Judge Jones (App. A, infra, pp. A-1 - A-12) and that court's judgment (App. B, infra, pp. A-13 - A-14) are not yet reported. The order overruling Petitioners' motion for

rehearing entered on July 1, 1970 (App. C, infra, p. A-15) and the order entered on July 21, 1970, granting a stay of the mandate (App. D, infra, pp. A-16 - A-17) are also unreported. The opinion of the United States District Court for the Southern District of Texas, Galveston Division (App. E, infra, pp. A-18 - A-46), dealing with the first question presented in this Petition, is reported at 300 F.Supp. 794. The judgment of the district court, pursuant to that opinion (App. F, infra, pp. A-47 - A-48) is unreported. An earlier memorandum and order of the district court (App. G, infra, pp. A-49 - A-57) dealing with the jury trial issue, the second question presented here, is reported at 278 F. Supp. 632.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on the 2nd day of June, 1970, and the order overruling Petitioners' motion for rehearing was entered on the 1st day of July, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Is an independent school district or its trustees and superintendent, sued in their representative capacities only, a "person" within the ambit of 42 U.S.C. 1983?

(2) Is a school district entitled to jury trial upon the legal issues raised in an action brought by teachers, not having tenure rights, for reinstatement and unpaid wages under 42 U.S.C. 1983 on the theory that they were not rehired because of their race.

STATUTES INVOLVED

The principal issue presented in this case is the proper construction of 42 U.S.C. 1983, the Civil Rights Act of 1871.[1]

STATEMENT

1. Proceedings before the District Court.

Petitioners are the Sweeny Independent School District of Sweeny, Texas, a body politic and municipal subdivision, its board of trustees and superintendent of schools, sued in their official or representative capacities only. Respondents are ten (10) former teachers previously employed by the school district who were not offered reemployment for the 1966-67 school term.

A detailed factual background of the events leading up to the filing of this suit is set forth in the district court's opinion (infra, pp. A-19 - A-26) and will not be restated here. Suffice it to say that when the school district voluntarily determined to totally integrate its entire system, it thereby reduced the total faculty required for the operation of its schools. As a result of that reduction, a number of teachers were not offered reemployment for the 1966-67 school year. Respondents are ten (10) of the seventeen (17) teachers who were not then reemployed and brought this suit claiming that they were not reemployed because of their race and sought immediate reinstatement and damages by way of back salary which they would have earned had they been rehired from year to year after the Spring of 1966.

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1. Hereinafter sometimes referred to as "Section 1983".

The district court granted jury trial at the request of Petitioners who, at that time, were sued in their individual as well as their representative capacities. During the voir dire examination of the jury panel, counsel for Respondents voluntarily moved the court to dismiss this action insofar as it sought recovery from the individuals in their individual capacities and to continue the suit against the school district and its superintendent and trustees in their representative or official capacities only. Thereafter, and at the conclusion of the trial and verdict finding that the Petitioners' decision not to rehire Respondents was not motivated by racial factors in any way, the district court determined, under the doctrine of *Monroe v. Pape*, 365 U.S. 167 (1961), that Petitioners could not state a cause of action against the Petitioner school district or its trustees and superintendent, sued in their representative capacities only, inasmuch as such Petitioners were not "persons" within the meaning of Section 1983. No judgment has been entered in this case on the basis of the verdict of the jury inasmuch as the district court's judgment was an order of dismissal (infra, p. A-48).

2. The Decision of the Court of Appeals.

Respondents appealed claiming that their dismissal of the trustees and superintendent in their respective individual capacities was not fatal to their ability to state a claim under Section 1983, urging that a school district and/or its trustees and superintendent, sued in their representative capacities only, are "persons" within the meaning of that statute. Respondents furthermore raised, in the court of appeals, the question of the district court's grant of jury trial in the first instance. Their argument on

this point was that while their decision to dismiss the individual Petitioners in their individual capacities was voluntary on their part, it was nonetheless a tactical move taken to appease various members of the jury panel who had expressed reservations against the assessment of money damages against individual school trustees; Respondents argued that had there been no jury there would have been no veniremen to express such reservations and they would have had no occasion to take the tactical step of dismissal of the individual Petitioners in their individual capacities.

The court of appeals, by a divided panel, reversed the judgment of the district court, holding that the trial court had erred in its construction of Section 1983, because the holding in *Monroe v. Pape*, supra, must be restricted to its own facts and furthermore that the school district was not entitled to trial by jury and that the district court had erred in so holding. Judge Jones, of the three Judge panel, dissented, stating that he was "in agreement with the district court in its holding that *Monroe v. Pape* . . ., means what it says and that it requires dismissal of Appellants' complaint for failure to state a claim upon which relief can be granted."

Petitioners Motion for Rehearing was routinely overruled, but the court granted a stay of its mandate for a period of thirty (30) days pending the filing of this Petition.

REASONS FOR GRANTING THE WRIT

1. The Section 1983 Question.

The decision of the court of appeals that Petitioners were "included within the meaning of 'person' in §1983 for the

equitable relief sought" is squarely in conflict with this Court's decision in the landmark case of *Monroe v. Pape*, 365 U.S. 167 (1961). It is furthermore contrary to the decisions in at least fifty-five (55) other cases. The progeny of *Monroe* are legion. For the convenience of the Court, Petitioners have assembled, in tabular form (*infra*, Appendix H, pp. A-58 - A-62), fifty-five (55) judicial decisions which have applied the rule that political subdivisions are not "persons" within the meaning of Section 1983 and therefore are not amenable to suit thereunder. Forty-nine (49) of these decisions expressly followed *Monroe;* six (6) of them pre-dated that famous decision of this Court (four of which were cited with approval in *Monroe*). Appendix H sets forth the style of the case, a description of the type of relief sought and the type of entity held not subject to Section 1983. As the Court can see from a cursory review of that table of cases, the courts of appeal in nine (9) of the circuits have followed the *Monroe* rule on this point as have at least 27 District Court decisions. The decision of the court of appeals below has cast doubt upon a proposition of law which, from the great wealth of authorities supporting it, should be well settled.

Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. §1983.

Mr. Justice Douglas, in the *Monroe* opinion, carefully and diligently reviewed the legislature history of the Civil Rights Act of 1871 (now Section 1983). As a result of that review, he concluded, and the remainder of the Court *unanimously* agreed, that in the passage of the Civil Rights Act of 1871 the Congress did not intend to include political subdivisions within the coverage of the Act. There, the plaintiffs brought suit against the city of Chicago and a number of its police officers for damages sustained by them in an unlawful search and detention. This Court sustained the position of the city of Chicago that it could not be liable under Section 1983 because Congress did not intend municipal subdivisions to be included by the word "person" as used in the Act (365 U.S. at 191-192). In footnote 50 to the majority opinion, Mr. Justice Douglas spoke to the amenability of municipalities in actions brought under Section 1983 for equitable, as opposed to legal, relief. *The construction placed on footnote 50 by the court of appeals below is the nub of this first question presented in this Petition.* Because of its singularly great importance to the decision in this case, Petitioners take the liberty to here set out the pertinent portion of footnote 50 from *Monroe.*

> ". . . in a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U.S.C. §1983, 42 U.S.C.A. §1983, were alleged. See *e.g.*, Douglas vs. City of Jeanette, 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1324; Holmes vs. City of Atlanta, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776. The *question* dealt with in our opinion was not raised in those cases, either by the parties or by the Court. *Since we hold that a municipal corporation is not a 'person' within the meaning of*

> *§1983, no inference to the contrary can any longer be drawn from those cases.*" 365 U.S. 167, 191 (Emphasis added).

Petitioners have continually asserted, and the district court held (*infra*, A-40), that this Court held, at footnote 50 of *Monroe*, in clear language, that because the *question* of whether or not a municipality could be subject to suit under Section 1983 had not been raised in the cases there mentioned which sought equitable relief, those cases could not be construed as authority for the proposition that municipalities could be subject to liability under Section 1983 in an action seeking equitable relief. The majority of the court of appeals below expressly differed with that construction of footnote 50 stating that the *question* referred to by this Court which was not raised in those cases mentioned in the footnote was not whether or not municipalities could be liable for equitable relief in Section 1983 cases, but that the *question* referred to was whether or not damages could be recovered against municipalities under the doctrine of respondeat superior in Section 1983 cases (infra, p. A-7). It is respectfully submitted that this is not only a strained but a clearly erroneous construction of footnote 50.

Petitioners submit that the Court's meaning expressed in footnote 50 of *Monroe* is self-evident. At least one previous decision which has specifically interpreted this Court's holding at footnote 50 in *Monroe* is *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6 Cir. 1967). In that suit, seeking legal and equitable relief, the court specifically dealt with the question of whether or not a municipality was a "person", as that term is used in Section 1983 for the purpose of suit

against it for equitable relief. The circuit court there settled the question by referring to footnote 50 of the *Monroe* opinion and concluding therefrom that "the Court seemingly settled the question of whether equitable relief against a municipality could be obtained under Section 1983." 379 F.2d at 323-324. In addition to the *Deane Hill Country Club* case, the Court will note that of the fifty-five (55) cases cited in Appendix H, *infra*, twenty-two (22) of them sought equitable relief either exclusively or in conjunction with legal relief.

A particularly interesting source which also specifically contradicts the interpretation of footnote 50 in *Monroe* made by the court of appeals below is the dissenting opinion of Judge Motley in the case of *O'Reilly v. Wyman*, 305 F.Supp. 228, 233 *et seq.* (S.D. N.Y. 1969). There, Judge Motley, whose credentials as an advocate for civil rights litigants before her appointment to the Bench are well known to this Court, candidly admitted that this Court, at footnote 50 in *Monroe*, "felt itself forced to decide that municipal corporations were not 'persons' for the purpose of granting equitable relief against them . . ." 305 F.Supp. at 235. That statement was made by Judge Motley in her dissenting opinion in which she was contending that the New York State Department of Social Services had been improperly dismissed upon the authority of *Monroe v. Pape*.

One of the cases cited with approval by this Court in *Monroe* for the proposition that a municipal subdivision is not subject to suit under Section 1983 was *Cobb v. City of Malden*, 202 F.2d 701, 703 (1 Cir. 1953). The *Cobb* case is closely in point with the case at bar in that it was a suit by school teachers for reinstatement by

injunction and back pay. The suit was brought against the city of Malden, its mayor and certain members of its Board of Aldermen and Common Council. The schools there were operated and administered through a committee of the city government. The teachers claimed that the defendants, under color of law, had unlawfully prevented the appropriation of sufficient funds to pay their salaries for the ensuing school year and had thereby indirectly discharged them. The complaint prayed for declaratory judgment, damages and injunctive relief whereby the defendants would be compelled to reinstate the teachers in their jobs. The district court dismissed the complaint as to all defendants, but on appeal, the court of appeals wisely distinguished between a claim against an individual, sued in his individual capacity, who, under color of law, had deprived one of constitutional rights and a municipal subdivision such as a city or school committee, neither of which were intended to be included under the designation "persons" in Section 1983. For that reason, the court of appeals affirmed the dismissal as to the city and the school committee and reversed and remanded the case for trial as to the individual defendants, sued in their individual capacities. Petitioners submit that the *Cobb* decision is dispositive of the case at bar.

The majority of the court of appeals below also held that the Petitioner trustees and superintendent are "persons" for the purposes of Section 1983 actions, even though sued in their representative capacities only. The authorities cited by the court for that proposition are cases in which judicial relief has been directed at officials sued in their representative capacities, but in which no issue was apparently raised on the question (*infra*, pp.

A-9 - A-10). The court cited a number of cases, which, admittedly, did not deal with the question of the amenability of officials sued in their representative capacities to suit under Section 1983. Reliance upon authorities such as *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964) is not sound. The district court below carefully treated the *Griffin* case specifically in this connection (*infra*, pp. A-41 - A-42), concluding that it was not an action brought under Section 1983 in the first place and that the question was not there considered by this Court in the second place. Likewise, the recent case of *Gittlemaker v. Philadelphia County*, 413 F.2d 84, 86 at n.1 (3 Cir. 1969), has similarly disposed of such a contention that *Griffin* indicated a retreat by this Court from the *Monroe* rule.

Furthermore, many of the cases listed in Appendix H, *infra*, specifically dealt with the distinction between actions against public officials in their individual, as opposed to their representative, capacities; consistently holding that actions brought under Section 1983 lie against such officials in their individual capacities, but not against them in their representative capacities. See: *Diamond vs. Pitchess, infra*, A-58; *Cobb vs. City of Malden, infra*, A-60; *Baxter vs. Parker, infra*, A-61; *Johnson vs. Hackett, infra*, A-61; and *Roberts vs. Trapnell, infra*, A-62.

In conclusion to this point, Petitioners respectfully submit that the *Monroe* decision and the numerous cases following it compel the conclusion in this case that the Petitioner school district and officials thereof sued in their representative capacities only are not "persons" within the meaning or intent of Section 1983 and that the learned opinion of the district court which reached

that conclusion only after careful review of the applicable authorities and legislative history involved should be affirmed.

2. The Jury Trial Question.

Petitioners' initial contention with respect to the jury trial question is that it was not ripe for appellate review because no judgment has been entered in this case on the basis of the verdict. The district court dismissed the case for failure to state a cause of action and has not ruled on the verdict, the sufficiency of the evidence to support it or any of the other objections Respondents raised to it. It is furthermore Petitioners' contention on this point that because Respondents voluntarily dismissed their suit as to the school trustees and superintendent in their individual capacities, they are not now in a position to invoke the jury trial issue as a ground to obtain reversal of the judgment of the court which was predicated on the fact that Respondents did not proceed against those trustees and the superintendent in their individual capacities. As originally instituted, this suit was brought against the Petitioner school district and its trustees and superintendent in their individual and respresentative capacities. During the voir dire examination of the jury panel, two (2) of the veniremen indicated a reluctance to assess money damages against school trustees individually. In response to those remarks, counsel for Respondents immediately approached the bench and dismissed their case as to the trustees and superintendent in their individual capacities. (*Infra*, pp. A-19 & A-26). This left, as defendants, only the school district and the trustees and superintendent, sued in their representative capacities only. At no time did counsel for Respondents seek any

other remedies such as challenging those veniremen for cause, exercising peremptory challenges against them, moving to strike the entire panel or utilizing any of the other procedural remedies available to them in such situations. 28 U.S.C. 1870. Accordingly, for Respondents to now complain, before the entry of judgment on the verdict, that the allowance of jury trial was reversible error because it required the presence of veniremen who expressed reservations against assessing damages to school board members, prompting them to dismiss their case as to such individuals, which was fatal to their case, is to complain of the result of actions voluntarily undertaken by them during the trial. It is well settled that such a claim cannot be the basis of reversal. *Milliken vs. Meyer*, 311 U.S. 457 (1941); *Orenstein vs. United States*, 191 F.2d 184 (1 Cir. 1951) and *Rosaly vs. Gonzales*, 106 F.2d 169 (1 Cir. 1939).

The keystone of the opinion of the court of appeals on this point was that no jury trial was proper because this was a suit for equitable relief only (infra, pp. A-10-A-12), and that the claim for back pay as damages was "an element" of the equitable remedy of reinstatement.

This Court has long since settled the question of whether or not jury trial is appropriate in actions which seek both legal and equitable relief. In *Beacon Theaters, Inc. vs. Westover*, 359 U.S. 500 (1959) and *Dairy Queen, Inc. vs. Wood*, 369 U.S. 469 (1962), this Court denied the contention that the right to jury trial may be impaired by combining equitable and legal claims. The district court carefully and extensively reviewed *Dairy Queen, Beacon Theaters*, and the subsequent opinions which have analyzed those cases (infra, pp. A-49 - A-67).

Indeed, the Fifth Circuit court of appeals, in explaining the holding of this Court in *Beacon Theaters*, has made it clear that "as long as any legal cause is involved the jury rights it creates control". *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5 Cir. 1961).

The logic employed by the court of appeals to avoid the application of *Dairy Queen*, *Beacon Theaters* and *Thermo-Stitch*, in this case, that Respondents' claim for back pay is simply incidental to the equitable relief of reinstatement, is false. *Beacon Theaters* was an action brought under the Sherman Act seeking to enjoin the activities of the defendant alleged to violate the Act and for damages as provided thereunder. *Dairy Queen* was an action claiming trademark infringement seeking to enjoin the infringement and recover damages which the plaintiff had sustained by reason thereof. If the logic utilized by the court of appeals below is correct, *Beacon Theaters* and *Dairy Queen* were both wrongly decided. If the circuit court's argument were valid, could not one argue equally that in an action for trademark infringement *(Dairy Queen)* or under the Sherman Act (*Beacon Theaters*) that the claim for damages was merely incidental to the principal relief sought; that being to enjoin the conduct of the defendants which was creating the damages. It follows therefore, that the instant case should be controlled by *Beacon Theaters* and *Dairy Queen*, as well as by *Thermo-Stitch, Inc. vs. Chemi-Cord Processing Corp.*, supra and *Swofford vs. B & W, Inc.*, 336 F.2d 406 (5 Cir. 1964) and that jury trial was properly allowed.

As a separate and alternative argument with respect to the jury trial issues, Petitioners contend that in any event

the grant of jury trial by the district court does not present ground for reversible error even if judgment on the verdict had been entered. The case of *Hurwitz v. Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943), holds unequivocally that an erroneous grant of jury trial in an action brought for equitable relief does not present reversible error; the appropriate remedy on appeal being simply a remand with directions to the district court to enter findings of fact. The *Hurwitz* decision has been followed in a long line of precedent. See: *Wolff v. Calla*, 288 F.Supp. 891 (E.D. Pa. 1968); *Schetter v. Housing Authority of the City of Erie*, 132 F.Supp. 149 (W.D. Pa. 1955) and *Aetna Insurance Company v. Paddock*, 301 F.2d 807 (5 Cir. 1962). It is interesting to note that the author of the *Paddock* decision, Judge Bell, also authored the majority opinion of the court of appeal below.

In conclusion, Petitioners submit, in connection with the jury trial question, that aside from the compelling direction of this Court as expressed in *Beacon Theaters* and *Dairy Queen* that jury trial is proper in a case, such as this, it is apparent that the current judicial philosophy concerning jury trial certainly has been directed toward resolving any questions in favor of allowing litigants to have their disputes resolved by juries. The merger of law and equity brought about by adoption of the Rules and this Court's interpretation in *Beacon Theaters* and *Dairy Queen* of the effect thereof on the right to trial by jury has certainly set the course of judicial direction in determining these issues in favor of jury trial. Petitioners implore the Court to put an end, once and for all, to the intellectual gymnastics which have been indulged by some of the circuit courts in order to justify the denial of jury trial to local governmental units in cases such as this.

Certainly the eloquent words of this same Judge Bell in an earlier case are aptly appropriate here:

> "This conclusion gives effect to my belief that there must be a constancy and sameness about procedure if the rights of all are to be secure, and it cannot be gainsaid that rights lost to some today, through make-shift procedures invoked for special situations of the moment, may be the rights of others tomorrow. The ideal of liberty and justice under, and equality before the law will not long survive under such a grievous practice. Nor may the practice be justified here with the result that the right to jury trial is lost, unless it is that those who deny the ideal are to be deprived of its benefits and, of course, that is not our system." *United States v. Barnett*, 330 F.2d 369 at 429 and 436 (5 Cir. 1963).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August, 1970.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari has been served upon opposing counsel by mailing copies of same to them at the addresses shown below by United States mail, postage prepaid, this the 18th day of August, 1970.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 28,188

MILDRED HARKLESS, ET AL,
Plaintiffs-Appellants,

versus

THE SWEENY INDEPENDENT SCHOOL DISTRICT, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(June 2, 1970)

Before JONES, BELL, and GODBOLD, Circuit Judges.

BELL, Circuit Judge: This appeal involves an action brought by ten Negro teachers alleging that the failure

of the school district to renew their teaching contracts when the school system was desegregated denied them rights secured by the Fourteenth Amendment. They seek reinstatement and back pay. Jurisdiction is premised on 28 USCA, § 1343(3) and 42 USCA, § 1983.[1]

The district court, after full jury trial, granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted. This was the result of applying *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, to hold that the defendants — the school district, and the school trustees and the superintendent in their official or representative capacities — could not be sued under § 1983. Being of a contrary view, we reverse.

After adopting a plan for complete school desegregation in the spring of 1966, the Sweeny Independent School District was able to reduce the number of its faculty for the school year 1966-67. In the process, 17 of the 25 Negro teachers in the system were not offered re-employment. This suit followed.

---

1. 28 USCA, § 1343(3), provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

42 USCA, § 1983, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint originally named each member of the board of trustees of the district and the superintendent in his individual as well as his representative capacity. Over objection, the district court granted the demand of defendants for jury trial as to the prayer for back pay and exercised its discretion under Rule 39(b), F.R. Civ.P., to also order a jury trial on all other factual issues.[2] Because of the unwillingness expressed at the voir dire examination by two veniremen to assess monetary damages against the defendants as individuals, plaintiffs dismissed the complaint as to the defendants in their individual capacities. Thus the suit proceeded against the trustees and the superintendent as defendants only in their representative capacities. The suit also proceeded against the school district.

During the trial and after the defendants in their individual capacities had been dismissed, the applicability of *Monroe v. Pape*, supra, to the question whether a cause of action was stated was drawn into issue. Put differently, would a suit lie against defendants as being "persons" within the meaning of 42 USCA, § 1983? The jurisdictional statute, § 1343(3), supra, is to accommodate suits otherwise authorized by law, here under § 1983. Defendants moved to dismiss on this basis and the motion was carried with the case.

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2. Rule 39(b) provides:

"Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

The memorandum opinion of the district court on the jury question is reported. *Harkless v. The Sweeny Independent School District*, S.D.Tex., 1968, 278 F.Supp. 632.

The case was submitted to the jury on special interrogatories. The jury returned a verdict finding that the decision not to rehire the plaintiffs was made without regard to their race, and that defendants acted in good faith, objectively comparing the qualifications of all teachers. However, the jury found that participation in this litigation was a factor in the decision not to offer re-employment to seven of the plaintiffs.

At this juncture, the district court granted the motion to dismiss. The court determined that plaintiffs had failed to state a cause of action under § 1983, relying on *Monroe v. Pape*, supra. See *Harkless v. Sweeny Independent School District of Sweeny, Texas*, S.D. Tex., 1969. 300 F. Supp. 794. This issue will be first considered. Because we conclude that it was erroneously decided, it will also be necessary, secondarily, to resolve the additional issue whether the court erred in granting a jury trial.

I.

The nub of this controversy is the breadth of the holding in *Monroe v. Pape*. We must follow that holding to its outer limits. The jurisdictional basis for this suit is 28 USCA, § 1343(3). It provides federal jurisdiction of civil actions authorized by law. As stated, the source of authorization claimed by appellants is 28 USCA, § 1983.[3] The defendants contest this authorization on the basis of *Monroe v. Pape*.

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3. The importance of this issue is to be seen in the fact, according to counsel for plaintiffs, that only three of plaintiffs can claim the jurisdictional amount which must be involved to rest jurisdiction on the presence of a federal question and the jurisdictional amount under 28 USCA, § 1331. Unlike § 1343(3), federal question jurisdiction under § 1331 need not be otherwise authorized.

Ordinarily, under our system of law, a decision of a higher court is binding as a precedent to the extent of the *ratio decidendi* of the case. As the Supreme Court has said, advisory opinions are prohibited by Art. III of the Constitution. *Stovall v. Denno*, 1967, 388 U.S. 293, 301, 87 S.Ct. 1967, 18 L.Ed.2d 1199. Under such a limitation, the holding in *Monroe v. Pape* would be restricted by the facts of the case to proscribing a suit against a municipality under the doctrine of respondeat superior for damages. Here the school district, under Texas law, is of a nature of a municipality, *Love v.. City of Dallas*, 120 Tex. 351, 40 S.W.2d 20, 26 (1931); *Lewis v. Independent School District of City of Austin*, 139 Tex. 83, 161 S.W.2d 450, 452 (1942), but the relief sought is equitable only — reinstatement and back pay. *Smith v. Hampton Training School for Nurses*, 4 Cir., 1966, 360 F.2d 577, 581, fn. 8.

Monroe v. Pape was an action to recover damages for the misconduct of police officers. The recovery was sought under § 1983 against the officers and also against their employer, the City of Chicago, under respondeat superior. The Supreme Court held that a cause of action could be maintained under § 1983 against the police officers but concluded that municipal corporations were not within the ambit of § 1983. Thus the *ratio decidendi* of the decision is that no cause of action lies against a municipality under § 1983 for damages under the doctrine of respondeat superior for the conduct of its police officers.

In footnote 50 to the opinion, the court stated with reference to its holding that a municipality was not included in § 1983:

"This has been the view of the lower federal courts. Charlton v. Hialeah (CA5 Fla) 188 F2d 421, 423; Hewitt v. Jacksonville (CA5 Fla) 188 F2d 423, 424; Cobb v. Malden (CA1 Mass) 202 F2d 701, 703; Agnew v. Compton (CA9 Cal) 239 F2d 226, 230; Cuiksa v. Mansfield (CA6 Ohio) 250 F2d 700, 703, 704. In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 USC § 1983 were alleged. See, e.g., Douglas v. Jeannette, 319 U.S. 157, 87 L ed 1324, 63 S Ct 877, 882; Holmes v. Atlanta, 350 U.S. 879, 100 L ed 776, 76 S Ct 141. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a 'person' within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases."[4]

The district court read footnote 50 as meaning that municialities were not "persons" within the meaning of § 1983 for any purpose — in law or in equity and based its decision on *Monroe v. Pape* in this posture. No suit would lie against a municiality under § 1983 under any circumstances.

The position of the district court was two-fold: *Monroe v. Pape* prohibited a suit against the school district under § 1983; perceiving no legal distinction between the school district, and its trustees and superintendent acting in their representative capacities, it followed that no suit would lie against the trustees and superin-

4. In the cases cited in footnote 50, *Douglas v. City of Jeanette*, and *Holmes v. City of Atlanta*, the defendants were the municipalities and also city officials. No question as to city officials being included in the term "persons" in § 1983 was considered in *Monroe v. Pape*.

tendent. It is to be remembered that, at this point in the proceedings, plaintiffs had dismissed the trustees and the superintendent as individuals.

We do not read footnote 50 so broadly. We read it within the context of the holding of the court and the text to which it is appended. We think the court was saying in the footnote that the issue of damages against municipalities under respondeat superior was a question not raised in the equitable relief cases cited and that no inference may be drawn from those cases that a municipal corporation is a person within the meaning of § 1983 for the purposes of a damage claim against it under respondeat superior. We do not perceive that the court was expanding its holding by a footnote dictum to eliminate municipalities as "persons" under § 1983 for the purposes of equitable relief, a question not expressly considered in the cited equitable relief cases.

Moreover, there are other reasons which buttress our interpretation of footnote 50. For one, it is worth noting that the Supreme Court has not followed the district court interpretation of the footnote. It is true that the question has not been expressly considered but a ruling has been rendered against a school district in a § 1983 case with no mention being made of any such limitation as to equitable relief.

We have reference to the case of *Tinker v. Des Moines Community School District*, 1969, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731. There injunctive relief was sought because of the expulsion of students. The school district was a defendant along with its directors and certain school officials. The injunctive relief was sought only against the directors and officials. Jurisdiction was based on 42 USCA, § 1983 and 28 USCA, § 1343

(3). The court decided the case in favor of plaintiffs. There was no reference to the § 1983 question as it might apply to the school district.

In *Tinker*, the Supreme Court cited *Ferrell v. Dallas Independent School District*, 5 Cir., 1968, 392 F.2d 697, a suit seeking equitable relief against a Texas school district, the school superintendent and a school principal. The merits of the case were considered there just as was the case in *Tinker* and no question was presented as to the cause of action being barred under *Monroe v. Pape*.

In addition, the Seventh Circuit has twice held that *Monroe v. Pape* is not to be applied to prohibit suits against municipalities for equitable relief only. *Adams v. City of Park Ridge*, 7 Cir., 1961, 293 F.2d 585; *Schnell v. City of Chicago*, 7 Cir., 1969, 407 F.2d 1084. This court, in a dictum, has taken the same view. *United States v. City of Jackson*, 5 Cir., 1963, 318 F.2d 1, 10-11.

There are lower court decisions in equitable actions to the contrary. *Deane Hill Country Club, Inc. v. City of Knoxville*, 6 Cir., 1967, 379 F.2d 321; *Patton v. Bennett*, E.D. Tenn. 1969, 304 F. Supp. 297, 299.

There are several decisions applying *Monroe v. Pape* to bar suits against municipalities for damages in respondeat superior situations. See, e.g., in this circuit, *Mayhue v. City of Plantation, Florida*, 5 Cir., 1967, 375 F.2d 447; *Blume v. City of Deland*, 5 Cir., 1966, 358 F.2d 698. See also *Harvey v. Sadler*, 9 Cir., 1964, 331 F. 2d 387.

While the question is not free from doubt, we are of the view that the school district here was included within the meaning of "person" in § 1983 for the equit-

able relief sought and that the district court erred in holding to the contrary.

II.

Turning then to the officials, the trustees and the superintendent, it seems well settled that § 1983 authorizes a suit against them. Federal judicial power has long been invoked to compel state officials to discharge their constitutional duties. See *Board of Commissioners of Knox County v. Aspinwall*, 1861, 65 U.S. (34 How.) 376, 16 L.Ed. 735; *Home Telephone & Telegraph Co. v. Los Angeles*, 1913, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510.

In numerous cases since *Monroe v. Pape*, the Supreme Court has permitted relief under § 1983 against state officials sued as such, without mention of that case. *Griffin v. School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (county board of supervisors), and see other cases which are the progeny of *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, such as *Alexander v. Holmes County Board of Education*, 1969, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19, and *Carter v. West Feliciana Parish School Board*, 1970, ____ U.S. ____, 90 S.Ct. ____, 24 L.Ed.2d 477. See also *Rinaldi v. Yeager*, 1966, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (state prison warden); *Davis v. Mann*, 1964, 377 U.S. 678, 84 S.Ct. 1453, 12 L.Ed.2d 609 (state election officials); *WMCA v. Lomenzo*, 1964, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568 (state election officials); *Reynolds v. Sims*, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (state election officials); *Wesberry v. Sanders*, 1964, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d

481 (governor and secretary of state); *Baker v. Carr*, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (state election officials).

We find no prohibition in *Monroe v. Pape* against the exercise of federal judicial power through § 1983 to redress constitutional wrongs through requiring appropriate official acts by officials sued in their representative capacities. We therefore conclude that § 1983 includes school district trustees and school superintendents, acting in their representative as well as their individual capacities, within the meaning of "person" as the term is used in §1983 for the purposes of the equitable relief sought here. Thus, it follows that the district court erred in holding to the contrary.

III.

The last question to be reached is the propriety of the grant of a jury trial. The district court determined that the back pay and the factual issues involved in the prayer for injunctive relief presented jury issues and, therefore, granted defendants' demand for jury trial. The law seems otherwise.

Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished

by their earnings, if any, in the interim. Back pay is merely an element of the equitable remedy of reinstatement. See *Smith v. Hampton Training School for Nurses,* supra. See also *NLRB v. Jones & Laughlin Steel Corp.,* 1937, 301 U.S. 1, 48, 57 S.Ct. 615, 81 L.Ed. 893; *Agwilines, Inc. v. NLRB,* 5 Cir., 1936, 87 F.2d 146, 151.

The district court concluded that *NLRB v. Jones and Laughlin Steel Corp.,* supra, and *Agwilines, Inc. v. NLRB, supra,* were no longer viable in light of the more recent decisions of *Beacon Theatres, Inc. v. Westover,* 1959, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988; *Dairy Queen, Inc. v. Wood,* 1962, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44; and *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.,* 5 Cir., 1961, 294 F.2d 486, 489. None of these cases involved back pay. Each involved separate equitable and legal claims joined in the same case. The legal claims were for resolution by the jury. The back pay issue here was not a separate legal claim — rather it was a part of the main equitable claim — reinstatement. The same is true as to the underlying factual issues pertaining to the claims to reinstatement.

This circuit has rejected the view ". . . that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by a jury." *Swofford v. B & W, Incorporated,* 5 Cir., 1964, 336 F.2d 406, 414. In an action by the Secretary of Labor for an injunction to compel employers to pay employees minimum wages and overtime due them, this court, after discussing *Beacon Theatres, Dairy Queen,* and *Thermo-Stitch,* stated: "In the instant case, however, the purpose of the injunction to restrain the withholding of wages due

is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest." *Wirtz v. Jones,* 5 Cir., 1965, 340 F.2d 901, 904. We then directed the district court to strike the defendants' demand for a jury trial. 340 F.2d at 905.

In a recent case involving a suit brought because of discrimination in employment, we determined that the employer was not entitled to a jury trial on the issue of back wages. *Johnson v. Georgia Highway Express, Inc.,* 5 Cir., 1969, 417 F.2d 1122. See also *Hayes v. Seaboard Coast Line Railroad Company,* S.D. Ga., 1969, 46 F.R.D. 49, 52.

We conclude that these authorities teach that a claim for back pay presented in an equitable action for reinstatement authorized by § 1983 is not for jury consideration nor are the factual issues which form the basis of the claim for reinstatement. The Seventh Amendment does not so require. The plaintiffs' claim should have been determined by the court. The grant of jury trial was error.

REVERSED and REMANDED for further proceedings not inconsistent herewith.

JONES, Circuit Judge, Dissenting

I am in agreement with the district court in its holding that *Monroe v. Pape,* 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, means what it says and that it requires dismissal of appellants' complaint for failure to state a claim upon which relief can be granted.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 28188

D. C. Docket No. CA 66-G-34
MILDRED HARKLESS, ET AL,
Plaintiffs-Appellants,

versus

THE SWEENY INDEPENDENT SCHOOL DISTRICT, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, BELL and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

JONES, Circuit Judge, Dissenting.

June 2, 1970

Issued as Mandate:

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28188

MILDRED HARKLESS, ET AL,
Plaintiffs-Appellants,

versus

THE SWEENY INDEPENDENT SCHOOL DISTRICT, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(July 1, 1970)

ON PETITION FOR REHEARING

Before JONES, BELL, and GODBOLD, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 28,188

MILDRED HARKLESS, ET AL,
Appellants,

versus

THE SWEENY INDEPENDENT SCHOOL DISTRICT, ET AL,
Appellees.

ON CONSIDERATION OF THE APPLICATION of the appellees in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 30 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 30 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a

copy of an order of the Supreme Court denying the writ, or upon the expiration of 30 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 21st day of July, 1970.

/s/ GRIFFIN B. BELL
UNITED STATES CIRCUIT JUDGE

APPENDIX E

Mildred HARKLESS, Alice Mae Jones, John P. Jones, Robert C. Woodard, Yarbough B. Kennedy, Willie L. Dotson, Florence Jones, Lillian F. Jammer, Benjamin F. Leviston and Velma L. Shelby, Plaintiffs,

v.

The SWEENY INDEPENDENT SCHOOL DISTRICT OF SWEENY, TEXAS, Fred Miller, Superintendent, Dr. Fletcher Hester, Weldon Bailey, E. H. Wallace, Tom B. Mays and E. N. Windler, Board Members, Defendants.

Civ. A. No. 66-G-34.
United States District Court
S. D. Texas
Galveston Division.
June 6, 1969.

Jack Greenberg, James M. Nabrit, III, Conrad K. Harper, William B. Turner and W. Haywood Burns, of NAACP Legal Defense and Educational Fund, Inc., New York City. Weldon H. Berry, Houston, Tex., and Thomas H. Dent, Galveston, Tex., of Dent, King, Cromwell and Wycliff, Houston, Tex., for plaintiffs.

Grant Cook, of Reynolds, White, Allen & Cook, Houston, Tex., for defendants.

MEMORANDUM OPINION AND ORDER

NOEL, District Judge.

1. *Preface*

After its adoption of a plan of complete school desegregation in the spring of 1966, defendant Sweeny Independent School District ordered the number of its faculty reduced for the school year 1966-67. In effecting the reduction, seventeen Negro teachers were not offered reemployment. Twelve of these brought this action for injunctive relief and money damages, alleging violation of their civil rights.

Plaintiffs named as defendants the district as such, and the superintendent of schools and the members of the district's school board, in both their individual and official capacities. But, at the time of voir dire examination of the jury panel, plaintiffs' counsel moved to dismiss all of the individual defendants in their individual capacities. The motion was granted, leaving as defendants only the district and the individual defendants in their official capacities.

Subsequently, and in response to a suggestion by the Court that subject matter jurisdiction over the remaining defendants might be lacking, defendants moved to dismiss on this ground. Briefs were submitted by all parties, and the motion was carried with the case pending the conclusion of trial.

Defendants' motion to dismiss, as well as numerous other motions listed later in this memorandum opinion and order, is now before the Court for decision. After careful consideration of the facts and applicable law, and for the reasons which follow, the Court is of the opinion that although subject matter jurisdiction is present, defendants' motion to dismiss should be granted because of plaintiffs' failure to state a claim upon which relief can be granted.

2. *Factual Background*

Prior to the school year 1965-66, the Sweeny Independent School District operated a racially segregated school system. White students and faculty were assigned to one group of schools, Negro students and faculty were assigned only to the George Washington Carver School.

During the spring of 1965, and in immediate response to the guidelines promulgated by the United States Department of Health, Education and Welfare for the desegregation of public schools, the board of trustees for the district adopted a two-phase plan of desegregation. The plan was submitted to and approved by the Department of Health, Education and Welfare. Thereafter, the district initiated the first phase of the plan, which was (a) that each student, under this plan, be permitted to attend the school of his choice and (b) desegregated kindergarten classes be formed, each for the school year 1965-66. The second phase of the desegregation plan, which was to commence in 1966-67, called for the complete desegregation of the system, including abolition of the George Washington Carver School as such, and the employment of all teachers without regard to race.

During the 1965-66 school year the district consisted of five schools: the primary school (kindergarten through third grade), the intermediate school (grades four through six), the junior high school (grades seven through nine), the senior high school (grades ten through twelve), and the George Washington Carver School (grades one through twelve). All faculty and all students at the George Washington Carver School were Negroes. Students of both races, including 65 Negro students, attended the other four schools in the district but only White

teachers taught at these schools. During this school year, the district employed twenty-four Negro teachers and one Negro principal.

All teaching and instructional personnel in the district were then and are now hired by the board of trustees upon recommendation by the superintendent of schools, who from 1958 to the present has been Mr. Fred Miller. The board of trustees has never employed anyone except upon recommendation of the superintendent. All teachers in the district are hired on a year-to-year basis. While the superintendent has at times received longer contracts, no teacher has ever had a contract of more than one year.

Each year non-teaching professional persons are recommended by the superintendent for re-employment at the regular February meeting of the board of trustees. The superintendent usually presents his recommendations for re-employment of classroom teachers at the regular March meeting of the board of trustees. New teachers and other personnel are recommended as needed. The board of trustees votes on the recommendations of the superintendent at the meeting in which they are presented.

The superintendent of schools bases his recommendations for re-employment of classroom teaching personnel on a system of teacher evaluation. Separate evaluations are made of each teacher in the system by his or her principal, the curriculum director and the superintendent. During the period when the school district operated a dual system as well as during the 1965-66 school year, White teachers were rated and compared only with other White teachers, and Negro teachers, only with other Negro teachers. As a result of the desegregation plan approved

by the United States Department of Health, Education and Welfare, the teacher evaluation process used in the spring of 1966 for evaluation of all teachers to be recommended for re-employment for the 1966-67 term, differed from previous evaluations. For the first time each teacher in the system was evaluated and compared with all other teachers in the system both Negro and White, without regard to race. The evaluation process was especially critical at this time because a staff study ordered by Superintendent Miller indicated that there would be at least twelve fewer teaching positions in 1966-67 than there were in 1965-66.

In early March 1966, Superintendent Miller requested all principals to rate their teachers on an evaluation form published by the Steck Company of Austin, Texas (Steck form 3528). In addition he requested each principal and the district's curriculum director to rate each teacher by assigning that teacher a number from one to ten, ten being as good as they had seen and one being unsatisfactory.[1] Superintendent Miller also rated each teacher in the system on this numerical scale.

Superintendent Miller added the three numerical ratings and used the combined total as well as the completed Steck forms, in preparing his recommendations for

1. At the request of Superintendent Miller, the district's curriculum director, C. W. New, also prepared informal anecdotal evaluations on each of the Carver faculty members. During the trial Superintendent Miller testified that because he feared racial trouble at the start of the 1966-67 school year, he asked New to prepare the anecdotal evaluations to assist him in defending or criticizing the Carver faculty members if the need arose. He also testified that he did not use the anecdotal evaluations in the process of preparing his recommendations for the March 8, 1966, board meeting. Plaintiffs disputed this assertion, and attacked it vigorously in extensive and searching cross-examination and in argument of counsel.

re-employment to the school board.[2] He did not recommend for re-employment seventeen teachers from the George Washington Carver School. The board of trustees approved Miller's recommendations at its March 8, 1966, meeting.

On March 9, 1966, Miller wrote all teachers not recommended for re-employment, informing them of the action of the board of trustees. In addition, he stated: "It's possible that you may be recommended and approved for a 1966-67 contract at a later date. This possibility is conditioned upon the available positions within the district, your qualifications for specific available positions and your competence as a teacher." Miller also offered each teacher not recommended an opportunity to come to him for a conference.

Two of the teachers not recommended immediately obtained new teaching positions elsewhere. They did not complete their 1965-66 contracts, resigning instead on April 15, 1966. Subsequently, all but two of the plaintiffs in this action also obtained teaching positions elsewhere.

In accordance with the desegregation plan adopted the previous year, the Sweeny Independent School District completely integrated its school system at the start of the 1966-67 school year. The George Washington Carver School was abolished as a Negro school. All students of all races in grades ten, eleven and twelve enrolled in Sweeny Senior High School. All students of all races in grades seven, eight and nine enrolled in the Sweeny Junior High School. All students of all races in grades four, five, and

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2. As is noted in note 1 *supra*, the parties at trial disagreed with respect to whether Miller also used the anecdotal evaluations in preparing his recommendations to the school board.

six enrolled in the Sweeny Intermediate School, which was housed in the former George Washington Carver School. All students of all races in kindergarten and in grades one, two and three enrolled in the Sweeny Primary School. In kindergarten and grades one through six, students were assigned to classroom units strictly on the ratio of races existing within a given grade. For example, if twenty-five percent of all fourth grade students were Negro, each fourth grade class contained twenty-five percent Negro and seventy-five percent White students. In all required or basic courses in the higher grades, students were assigned strictly on the racial ratio of each course as in the elementary grades. The racial ratio of elective courses at the secondary level depended on which students signed up for them. This system of racial balancing as outlined in the desegregation plan and implemented for the first time in 1966-67 has been used every semester since September 1966.

On May 23, 1966, twelve[3] of the Negro teachers not rehired filed this suit, naming as defendants the school district, its superintendent, and the members of its board of trustees. The individuals named as defendants were sued in their individual as well as their official capacities. Plaintiffs alleged that the suit was brought as a class action on behalf of themselves and all other Negro teachers similarly situated. Jurisdiction was asserted under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. The complaint alleged that plaintiffs and all other members of their class (Negro teachers not rehired by the district for the 1966-67 school year) were not rehired solely because of race. The complaint sought a preliminary and

3. Two of the teachers named as plaintiffs in the original complaint were subsequently dismissed as plaintiffs at their request.

permanent injunction enjoining all defendants (the school district, the board of trustees, and the superintendent) from refusing to hire and assign teachers without regard to race and specifically from failing to offer teaching contracts for the 1966-67 school year to plaintiffs and members of their class solely because they are Negroes. In addition, plaintiffs sought damages for back pay and other allowances, costs, and reasonable attorneys' fees. The request for an immediate preliminary injunction was carried with the case.

Defendants answered the complaint on June 15, 1966, and objected that the suit was not a proper class action under Rule 23(a), F.R.Civ.P. Subsequently, defendants filed a plea in abatement alleging that plaintiffs had failed to exhaust administrative remedies. Counsel for both sides began discovery proceedings, and pre-trial conferences were held on November 18, 1966; December 13, 1966; November 16, 1967; March 8, 1968; April 9, 1968; and November 22, 1968. On April 25, 1967, the Court ordered the action stripped of its character as a class action, ordered the plaintiffs to proceed individually, and denied defendants' plea in abatement. On November 16, 1967, plaintiffs moved for leave to amend the complaint to include a claim that the methods used by the district in not rehiring them violated the due process clause of the Fourteenth Amendment. Leave to amend was granted, the motion to amend being deemed to constitute the amended complaint. Defendants filed an amended answer, and demanded a jury trial.

Plaintiffs moved to strike the jury demand. On January 19, 1968, the Court overruled the motion to strike the jury demand as to the amended complaint and transferred the cause to the jury docket. *See* Harkless v. Sweeny In-

dependent School District, 278 F.Supp. 632 (S.D. Tex. 1968). Thereupon, plaintiffs moved to dismiss the amended complaint insofor as it raised a jury issue, requested the case be transferred to the nonjury docket, and alternatively moved for leave to take an interlocutory appeal. Defendants moved to have the entire case decided by a jury, except for purely equitable issues. On June 6, 1968, the Court granted defendants' motion for jury trial on all issues triable to a jury, denied plaintiffs' motion for a transfer to the non-jury docket, denied plaintiffs' motion to dismiss the amended complaint, and denied the motion for leave to take an interlocutory appeal. Subsequently, the Court denied a motion for leave to intervene filed by the National Education Association.

On March 3, 1969, ten of the original plaintiffs and all defendants announced ready and the case proceeded to trial. During the course of voir dire examination, plaintiffs moved to dismiss all of the individual defendant's in their individual capacities, electing to proceed instead only against the defendant school district and against the superintendent and board members solely in their official capacities.[4] This motion was made for tactical reasons which are obvious from the record. The Court granted the motion and allowed the parties to amend the pretrial order accordingly. After reflection on the possible consequences of the dismissal, the Court sua sponte raised the issue of subject matter jurisdiction in open court and requested the parties to submit briefs, with particular emphasis on the relevance of Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).[5] Briefs were submitted and the question was carried with the case.

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4. Tr. 67-81.

5. Tr. 1047-49.

On March 13, 1969, the case was submitted to the jury on special interrogatories. The jury found:

1. That race was not a factor in the failure of the board of trustees to offer re-employment for the school year 1966-67.

2. That the board of trustees at its March 8, 1966, meeting decided that the teaching staff of the district would have to be reduced as a result of desegregation.

3. That the qualifications of the ten plaintiffs to teach in the district were fairly and impartially evaluated and compared with the qualifications of all other teachers who taught in the system during the school year 1965-66.

4. That before recruiting from outside the system, the board did not fail to determine that the plaintiffs were not qualified to fill any vacancies.

5. That Superintendent Miller and the board of trustees acted in good faith at all times and in every respect in the process of the board's decision not to offer the plaintiffs re-employment for the school year 1966-67.

6. That a factor relied upon by the board in not offering re-employment to seven of the plaintiffs was the fact that these particular plaintiffs were parties to this law suit.

At the close of plaintiffs' evidence the defendants moved for summary judgment as to the claim for money damages on the ground that there was no money appropriated by the school district to pay such a judgment if awarded. The motion was ordered carried with the case and both parties submitted briefs on the point. Defendants subsequently moved (1) to dismiss the case for lack of jurisdiction on the ground that a school district is not a "person" within the meaning of 42 U.S.C. § 1983 (the

Monroe v. Pape issue mentioned above); (2) to dismiss the case for lack of evidence sufficient to raise the fact issue that plaintiffs were not rehired because of their race and that they were denied due process by the procedures employed in evaluating them for employment and in failing to rehire them; (3) to dismiss plaintiffs' due process prayer for lack of jurisdiction; (4) to dismiss plaintiffs' claim for attorneys' fees for lack of evidence sufficient to raise the fact issue that the defendant district was or had been guilty of unreasonable or obdurate obstinacy in considering plaintiffs for re-employment; (5) for an instructed verdict on plaintiffs' claims for money recovery and attorneys' fees; and (6) for judgment in accordance with the verdict of the jury. In making this last contention, defendants argued that the jury's answer to the last interrogatory was merely evidentiary in view of their answers to the other interrogatories.

After the verdict was returned, plaintiffs moved (1) for leave to further amend their amended complaint and the amended pre-trial order in order to conform the issues pled and relief prayed for, to the evidence and issues as developed at trial; (2) for a directed verdict; (3) for judgment notwithstanding the verdict; and (4) for a new trial on the ground that the verdict of the jury, insofar as it is adverse to them, is against the clear weight of the evidence.

The parties have briefed and argued all of the pending motions at length, both in the course of trial and in a post-trial hearing called for that purpose. All are now ripe, but only plaintiffs' motion to amend and defendants' motion to dismiss need be reached. Attached to plaintiffs' motion is the proposed amendment to their

amended complaint, which for convenience will be designated their second amended complaint. It is a copy of their prior complaint with certain modifications, namely the deletion as plaintiffs of the two original plaintiffs heretofore dismissed and deletion of the allegation of a class action, consistent with the order of the Court. However, the copy does not make clear that by virtue of the trial amendment requested by counsel for plaintiffs, the individual defendants are now named and sued in their official capacities only.

Plaintiffs' motion to file their second amended complaint and to amend the pre-trial order is granted, provided, however, counsel for plaintiffs shall within ten (10) days (a) furnish the Clerk for filing a second amended complaint which names as plaintiffs only those left in the case and which has deleted from it references to the class action heretofore ruled on by the Court, adversely to the contentions of plaintiffs and, which clarifies the capacity in which the individual defendants are sued; and (b) prepare an amendment to the pre-trial order consistent with their second amended complaint and this order of the Court, and furnish same to opposing counsel for approval and for entry by the Court. When approved by the Court each will be filed by the Clerk but, be deemed to have been filed concurrently herewith.

3. *Reasons for Dismissal of Complaint*

For the reasons that follow, the Court holds that it does have subject matter jurisdiction of this cause by virtue of 28 U.S.C. § 1343(3), but that the said second amended complaint, hereinafter referred to as the complaint, must be dismissed for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983. Be-

cause his holding is dispositive, it is unnecessary to enter findings of fact and conclusions of law pursuant to Rule 52, F.R.Civ.P., on the merits of plaintiffs' claims, to accept or reject the jury's verdict, or to act upon any other of the motions now pending. All facts set out in the above statement of the case, to the extent that they are relevant to the disposition of the motion to dismiss, are determined to be jurisdictional facts for the purposes of such motion. This determination, however, is not intended to be, and is not a finding of any fact concerning the merits of this cause, nor a finding of any fact with reference to any of the parties' other pending motions.

The relevant issue put at rest by Monroe v. Pape, and brought to the attention of counsel at trial, does not deprive this Court of subject matter jurisdiction. *Cf.* Romero v. International Terminal Operating Co., 358 U.S. 354, 359, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959). Plaintiffs' allegation that jurisdiction lies under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 is sufficient to give this Court the jurisdiction to determine whether it is empowered to grant the relief sought. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); Wheeldin v. Wheeler, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963). However, the question of whether or not the complaint states a claim upon which relief can be granted is illuminated by Monroe v. Pape. While defendant has not raised it by formal motion under Rule 12(b) (6), F.R.Civ.P., both parties have briefed it fully,[6] and it is now before the Court for decision.

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6. Plaintiffs in their Supplemental Trial Brief frame the issue as whether "the Monroe rule does exempt defendants from liability under Section 1983", p. 3. Defendants argue in their "Brief in Support of Defendant's Motion to Dismiss for Lack of Jurisdiction" that "this Honorable Court does not have jurisdiction to grant the relief herein sought by the Plaintiffs." pp. 1-2.

In this case, as in Monroe v. Pape, the jurisdiction specified and relied upon in plaintiff's complaint is that granted by 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. These provide:

§ 1343. Civil rights and elective franchise.

The District courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * * * * *

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The issue before this Court, therefore, is whether § 1983 imposes liability on the school district and the individual defendants in their official capacities. Stated differently,

it is whether these defendants are "person[s]" within the meaning of that section.

The statute now codified as 42 U.S.C. § 1983 was enacted as § 1 of the Act of April 20, 1871.[7] Little direct evidence has been found in the legislative history of that Act casting light on the meaning of the word "person" as it appeared in § 1. Rep. Shellabarger stated that § 1 was modeled on § 2 of the Act of April 9, 1866,[8] which

> provides [for] a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery. This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.[9]

Rep. Shellabarger then argued that if the Congress possessed the constitutional power to enact the criminal statute, "then it is equally competent to pass into law this first section of this bill."[10] In this particular, § 1 of the

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7. Ch. 22, 17 Stat. 13.

8. Ch. 31, 14 Stat. 27, now 18 U.S.C. § 242. The history of this statute is traced in Screws v. United States, 325 U.S. 91, 98-100, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

9. Cong. Globe, 42d Cong., 1st Sess. 68 (Mar. 28, 1871) (appendix) [hereinafter cited as "Globe," with page and date only], reprinted in The Reconstruction Amendments' Debates 493 (Va. Comm'n on Const. Govt. 1967) [hereinafter cited as Debates]: *accord*, Globe 568 (April 11, 1871), reprinted in Debates 547 (remarks of Sen. Edmunds).

10. Globe 68, reprinted in Debates 493, *supra* note 9.

1871 Act and § 2 of the 1866 Act together are similar to § 2 of the 1871 Act, which imposed criminal sanctions on "each and every person" engaging in certain criminal conspiracies and then provided that anyone injured as a result of such a conspiracy could maintain an action for damages "against any one or more of the persons engaged in such conspiracy".[11] As it is difficult to imagine a criminal prosecution directed against a state, it seems equally unlikely that the civil remedies were intended to be directed against anyone except individuals.

Other remarks in both houses of Congress support the proposition that § 1 was not intended to impose civil liability on governmental units. Thus Senator Thurman, an opponent of the bill, could speculate that

> every hotel-keeper, every steamboat man, every keeper of a place of public amusement, every school director, may be liable under this bill because he does not give to the colored people the absolute social equality of mixing indiscriminately with the whites at places of public amusement, or in the hotels, or on the steamboats, or in the schools. Every railroad company, if it sets apart a particular car for colored people, though it may be as good a car as any in the train, is, upon this interpretation of the Constitution, liable to an action in the Federal courts under this bill, should it become a law.[12]

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11. *Cf.* the remarks of Rep. Dawes, Globe 476 (Apr. 7, 1871), reprinted in Debates 536, discussing §§ 1 and 2 of the 1871 Act as a unit. The civil portion of § 2 of the 1871 Act is now codified as 42 U.S.C. § 1985. The criminal portion is codified in scattered sections of Title 18 of the United States Code.

12. Globe 217 (Apr. 13, 1871) (appendix), reprinted in Debates 554.

And Rep. Whitthorne, another opponent, was moved to predict

> that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with loaded pistol flourishing it, &c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals."[13]

Senator Frelinghuysen, in discussing the meaning of the Fourteenth Amendment's direct prohibition against states, remarked:

> Now is the United States to protect the privileges of citizens of the United States in the States? It cannot deal with the States or with their officials to compel proper legislation and its enforcement; it can only deal with the offenders who violate the privileges and immunities of citizens of the United States."[14]

Focusing on the means for enforcing that Amendment, Senator Frelinghuysen continued:

> There are three classes of remedies that might be applied: civil remedies, criminal remedies, and public or national relief.

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13. Globe 337 (Mar. 29, 1871), reprinted in Debates 502. *See also* Globe 49-50 (Mar. 28, 1871) (appendix), reprinted in Debates 498 (remarks of Rep. Kerr); Globe 482 (Apr. 5, 1871), reprinted in Debates 537 (remarks of Rep. Wilson of Ind.); Globe 209 (Apr. 1, 1871) (appendix), reprinted in Debates 519 (remarks of Rep. Blair of Mo.).

14. Globe 501 (Apr. 6, 1871), reprinted in Debates 541.

> As to the civil remedies, for a violation of these privileges, we know that when the courts of a State violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts. And since the fourteenth amendment forbids any State from making or enforcing any law abridging these privileges and immunities, as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights. As to the civil remedy no one, I think, can object.[15]

On the other hand, an extensive search has failed to uncover any evidence that in enacting § 1 of the Act, now 42 U.S.C. § 1983, the Congress intended to impose civil liability on states or state subdivisions.[16] The congressional purpose expressed in §§ 1 and 2 of the Act is perhaps best stated in the words of Rep. Burchard:

> For the neglect or refusal of a State to perform a constitutional duty, the remedies and power of enforcement given to the General Government are few and restricted. It cannot perform the duty the Constitution enjoins upon the State. If a State fails to appoint presidential electors, or its Legislature

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15. *Id.*, reprinted in Debates 542. These remarks may have been in answer to those of Rep. Cox two days before, Globe 455 (Apr. 4, 1871), reprinted in Debates 534. *See also* Globe 459-460 (Apr. 4, 1871), reprinted in Debates 534 (remarks of Rep. Coburn).

16. Other references to § 1 include Globe 153 (Apr. 4, 1871) (appendix), reprinted in Debates 529 (remarks of Rep. Garfield); Globe 313 (Apr. 6, 1871) (appendix), reprinted in Debates 544 (remarks of Rep. Burchard).

> to choose Senators, or its people to elect Representatives, Congress cannot act for them. Nor do prohibitions upon States authorize Congress to exercise the forbidden power. It may doubtless require State officers to discharge duties imposed upon them as such officers by the Constitution of the United States. A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it. The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consummated through the officers by whom it acts. May it not then equally punish the illegal attempts of private individuals to prevent the performance of official duties in the manner required by the Constitution and laws of the United States?[17]

So the bill was passed by the House and sent to the Senate. There Senator Sherman offered an amendment, which the Senate adopted, rendering " 'the inhabitants of the county, city, or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged or his widow or legal representative."[18] This amendment, now 42 U.S.C. § 1986, was rejected by the House, and rejected again when the conference com-

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17. Globe 314 (Apr. 6, 1871) (appendix), reprinted in Debates 545.

18. Monroe v. Pape, 365 U.S. 167, 188, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961).

mittee reported a variation."[19] Only when the provision for municipal liability was deleted, to be replaced by a provision extending "liability in damages to 'any person or persons, having knowledge that any' of the specified wrongs are being committed", did the amended bill pass."[20]

In both houses of Congress the debate was vigorous on the question whether the Sherman amendment was constitutional or desirable. Senator Sherman supported it as a means for compelling men of wealth and property to take action against the Klan.[21] Rep. Butler of Massachusetts pointed out that the opponents of the amendment treated it

> as if it were a punitive section only. It is not. It is an insurance section. It insures the citizen the protection of the laws; and the considerations as to the want of power to punish or the want of power to interfere with the crimes in the States nowhere applies to this section. It is not punitive or penal, but remedial simply. And the question comes up whether the United States, under our Constitution, have the power to give a remedy to the citizen when he is wronged.[22]

But these arguments failed to carry the day. After the House had rejected the first conference report, Rep. Poland, a member of the second conference committee, explained the compromise to the House as follows:

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19. *Id.* at 188-189, 81 S.Ct. at 484.
20. *Id.* at 189-190, 81 S.Ct. at 485.
21. Globe 761 (Apr. 18, 1871), reprinted in Debates 566.
22. Globe 792 (Apr. 19, 1871), reprinted in Debates 568.

This brings me to the last cause of disagreement — to what is known as the Sherman amendment. I did understand from the action and vote of the House that the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law. We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section imposing liability upon towns and counties must go out or we should fail to agree. At the same time we said to them there was a disposition on the part of the House, in our judgment, to reach everybody who was connected, either directly or indirectly, positively or negatively, with the commission of any of these offenses and wrongs, and we would go as far as they chose to go in inflicting any punishment or imposing any liability upon any man who shall fail to do his duty in relation to the suppression of those wrongs.

The result was this section which we have reported in lieu of the Sherman amendment. The substance of it is that any person who has knowledge of any of the offenses named, any of the wrongs already described, any of the conspiracies indicated in the second section are about to be committed, it shall be his duty to use all reasonable diligence within his power to prevent it; and if he fails to do so, so much damage as is occasioned to anybody in consequence of his failure, for so much he shall be responsible in an action.[23]

23. Globe 804 (Apr. 19, 1871), reprinted in Debates 569.

Senator Edmonds, also a member of the conference committee that had devised the compromise, described it as a provision "dealing with the citizen under the Constitution," and stated that the compromise had been occasioned by "difficulties which had occurred to a majority of the House of Representatives respecting our power to deal with the particular organization in a State called a county or a town."[24]

After it had considered the history of the Act of April 20, 1871, in detail, the Supreme Court in Monroe v. Pape reached the following conclusion:

> The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them. Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted.[25]

This Court has reviewed that same legislative history at length, and can find no reason to suppose that the 42d Congress intended to distinguish municipalities from other kinds of political subdivisions of a state. In fact, all the legislative evidence before this Court suggests the opposite, for every argument supporting or opposing the imposition of municipal liability applies indiscriminately to political subdivisions of every kind.[26] The decision in

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24. Globe 820 (Apr. 19, 1871), reprinted in Debates 570.

25. 365 U.S. at 191-192, 81 S.Ct. at 486.

26. *E.g.*, Globe 791 (Apr. 19, 1871), reprinted in Debates 567 (remarks of Rep. Willard); Globe 793 (Apr. 19, 1871), reprinted in Debates 568 (remarks of Rep. Poland).

Monroe v. Pape may not be confined, as plaintiffs urge, to suits against municipalities.

The Supreme Court's recent decision in Tinker v. Des Moines Independent Community School District[27] is not inconsistent with this broad reading of Monroe v. Pape. While *Tinker* was a suit like this one, brought under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 against a school district as well as its board members and officials,[28] the Court's failure to discuss the district's amenability to suit under § 1983 places *Tinker* in a class of cases ably distinguished by Justice Douglas in Monroe v. Pape:

> In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U.S.C.§ 1983 were alleged. See, e.g., Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 [1943]; Holmes v. City of Atlanta, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 [1955] [per curiam]. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a "person" within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases.[29]

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27. 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

28. *See* Tinker v. Des Moines Indep. Community School Dist., 258 F.Supp. 971-972 (S.D. Iowa 1966), aff'd per curiam by an equally divided court, 383 F.2d 988 (8th Cir. 1967) (en banc), rev'd, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

29. Monroe v. Pape, 365 U.S. 167, 191 n.50, 81 S.Ct. 473, 486, 5 L.Ed.2d 492 (1961).

Tinker, therefore, is no authority for a proposition neither raised nor discussed by the district court[30] or on appeal.[31] And this Court has found no case suggesting that the Supreme Court would overrule Monroe v. Pape or restrict its applicability to municipalities.

Plaintiffs cite one case as authority for the proposition that a county is a "person" within the meaning of § 1983. United States v. Holmes County, 385 F.2d 145 (5th Cir. 1967). That suit was an action brought under 42 U.S.C. § 1971, a companion section to § 1983 safeguarding voting rights. As the Court of Appeals noted in *Holmes County*, § 1971 was amended by the Civil Rights Act of 1960 to provide expressly for suits against states and state subdivisions. *See* § 601(b), 74 Stat. 90. Nevertheless, in holding that the county could be sued directly, the Court of Appeals elected not to rely on the 1960 amendment. Instead, the court cited Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) for the proposition that a county is a "person" within the meaning of § 1983, and reasoned that the same term in § 1971 must also include a county, "since both [provisions] were enacted with the aim of vindicating constitutionally protected rights." 385 F.2d at 148. *Griffin*, however, was not "an action at law, suit in equity, or other proper proceeding for redress" under § 1983, but rather a suit, originally under the 3-judge statute, 28 U.S.C. § 2281,

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30. *See* Tinker v. Des Moines Indep. Community School Dist., 258 F.Supp. 971 (S.D. Iowa 1966).

31. *See* Tinker v. Des Moines Indep. Community School Dist., 383 F.2d 988 (8th Cir. 1967) (en banc) (aff'g per curiam by an equally divided court), rev'd, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969).

"to enjoin racial segregation in the public schools of Prince Edward County, Virginia."[32] Section 1983, in fact, was neither discussed nor even cited by the Supreme Court in *Griffin*. In the passage cited by the Court of Appeals in *Holmes County*, 377 U.S. at 233, 84 S.Ct. 1226, the Supreme Court was disposing of the suggestion that the Eleventh Amendment forbids suits against counties."[33]

Holmes County was, as noted above, a voter registration case brought under 42 U.S.C. § 1971. To the extent that it holds that a county or other state subdivision is an entity that may be sued under 42 U.S.C. § 1983, it is inconsistent not only with Monroe v. Pape and the legislative history quoted above, but also with four earlier Fifth Circuit decisions, two antedating and two following Monroe v. Pape.[34] Extensive research, both by the parties and by the Court, has failed to uncover any reported case imposing civil liability under 42 U.S.C. § 1983 on any governmental subdivision. Because the cited holding in *Holmes County* is no more than an alternate ground for the decision, because the suit there was not one seeking to impose civil liability under 42 U.S.C. § 1983, and because every court since Monroe v. Pape confronted by a suit against a political subdivision under 42 U.S.C. § 1983 (including the Court of Appeals for the Fifth

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32. Allen v. County School Bd. of Prince Edward County, 249 F.2d 462, 463 (4th Cir. 1957).

33. See Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890); Ennescott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 579, 66 S.Ct. 745, 90 L.Ed. 862 (1946), cited at 377 U.S. 233, 84 S.Ct. 1234.

34. Charlton v. City of Hialeah, 188 F.2d 421 (5th Cir. 1951); Hewitt v. City of Jacksonville, 188 F.2d 423 (5th Cir. 1951); Blume v. City of DeLand, 358 F.2d 698 (5th Cir. 1966) (per curiam); Mayhue v. City of Plantation, 375 F.2d 447, 451-452 (5th Cir. 1967).

Circuit in the cases just cited) has applied the *Monroe* decision broadly,[34] this Court must decline to follow *Holmes County* to whatever extent it may apply in this case.[35] Accordingly, it is the opinion of this Court that the defendant district is not a "person" as that term is used in § 1983,[36] and that plaintiffs are not entitled to

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35. *E.g.*, Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968) (county); Brown v. Town of Calimesa, 392 F.2d 346 (9th Cir. 1968) (town, county); Williford v. California, 352 F.2d 474 (9th Cir. 1965) (state); Harvey v. Sadler, 331 F.2d 387 (9th Cir. 1964) (school district); Link v. Greyhound Corp., 268 F.Supp. 898 (E.D. Mich. 1968) (county); Johnson v. Hackett, 284 F.Supp. 933 (E.D. Pa. 1968) (township, township board of commissioners); United States ex rel. Gittlemacher v. Pennsylvania, 281 F.Supp. 175 (E.D. Pa. 1968) (city, city hospital, state); Baxter v. Parker, 281 F.Supp. 115 (N.D. Fla. 1968) (county, sheriff and deputy sheriff in their official capacity).

36. As an alternate ground for declining to follow *Holmes County*, this Court records its belief that if the issue there presented again arises before the Court of Appeals for the Fifth Circuit, that court may well reconsider and decline to follow the reasoning in *Holmes County*. As noted above, in *Holmes County* the court reasoned that counties are persons under § 1983, that § 1971 and § 1983 are both statutes "enacted with the aim of vindicating constitutionally protected rights," whence counties are persons under § 1971. Section 1971, however, derives not from the Act of April 20, 1871, but from the Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140. Thus it would appear that the syllogism in *Holmes County*, contains a non sequitur, for as the Supreme Court recognized in Monroe v. Pape, *see* 365 U.S. at 190-191, 81 S.Ct. 473, the reconstruction Congress employed the term "person" in different ways at different times. This ground for declining to follow the reasoning of *Holmes County* is entirely separate from the ground mentioned in the text, namely that the case cited as authority in the opinion does not support the major premise of the opinion.

37. Out of an abundance of caution, defendant has cited to the Court cases decided by the Texas Supreme Court holding school districts to be "local public corporations of the same general character as municipal corporations." Love v. City of Dallas, 120 Tex. 351, 40 S.W.2d 20 (1931); accord, Lewis v. Independent School Dist., 139 Tex. 83, 161 S.W.2d 450 (1942). Texas school districts thus are within the letter of the *Monroe* decision, as well as its spirit.

and may not be granted relief of any kind against the district under the authority of § 1983. Plaintiffs therefore have failed to state a claim against the district upon which relief can be granted.

Plaintiffs also attempt to distinguish *Monroe* on the ground that the individual defendants in this case were dismissed only in their individual capacities, with the suit proceeding against the individual defendants in their official capacities, as well as against the district. Courts that have had occasion to apply *Monroe* in this situation have uniformly held that suits may be maintained only against the officials individually, and that governmental boards and governmental officials in their official capacities are not persons within the meaning of § 1983.[38] This is only reasonable.

The legislative history of the Act of April 20, 1871, indicates clearly that "county and town organizations" were excluded from the coverage of the Act because the Congress believed that they should not be held responsible for damage caused by the wrongs which were the subject of that act.[39] A suit against an official in his official capacity is equivalent to a suit against his principal, the state subdivision he represents. Only if a suit is brought against the official in his individual capacity can it be said, to use the language of Rep. Burchard, that "The General Government cannot punish the State, but the officer who violates his official constitutional duty can

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38. Glancy v. Parole Bd., 287 F.Supp. 34 (W.D. Mich. 1968) (parole board); Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968) (township board of commissioners); Baxter v. Parker, 281 F. Supp. 115 (N.D. Fla. 1968) (sheriff and deputy sheriff in their official capacity).

39. Remarks cited note 26 *supra*.

be punished under Federal law."[40] The 42d Congress clearly could not have intended to exclude state subdivisions as such from the ambit of § 1983, and yet authorize suits to be maintained against state officials solely in their official capacities. Plaintiffs thus have failed to state a claim against the individual defendants in their official capacities, as well as against the district.

As a final source for sustaining this Court's power to grant the relief they seek, plaintiffs assert that because "the complaint in paragraphs I and X expressly sought relief on the additional grounds of the due process and equal protection clauses of the Fourteenth Amendment," these clauses, "coupled with the foundation of jurisdiction under 28 U.S.C. Section 1343(3), give this Court jurisdiction to redress the wrongs to plaintiffs." This argument, too, is untenable. Section 1343 grants to the district courts jurisdiction only over civil actions "authorized by law to be commenced by any person". It cannot be argued that the Fourteenth Amendment itself authorizes the commencement of civil actions. To so construe it would be to ignore the express terms of the Amendment and render the enactment of 42 U.S.C. § 1983 superfluous. It has been held above that 42 U.S.C. § 1983 does not authorize the commencement of this suit against these de-

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40. Remarks quoted in text accompanying note 17 *supra; accord*, Ex parte Young, 209 U.S. 123, 159-160, 28 S.Ct. 441, 52 L.Ed. 714 (1908):

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

fendants. Moreover, plaintiffs have failed to come forward with another statute authorizing such commencement, and this Court is aware of no such statute. Therefore, as 28 U.S.C. § 1343(3) is not sufficient in the absence of another statute to authorize the prosecution of civil actions against persons alleged to have violated another's constitutional rights, plaintiffs' claim must be dismissed.

For the foregoing reasons, judgment will be entered in this cause dismissing the claims asserted by plaintiffs in their second amended complaint.

The Clerk will file this memorandum opinion and order and the separate writing constituting the judgment of the Court and furnish copies to each counsel of record.

APPENDIX F

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. 66-G-34

MILDRED HARKLESS, ALICE MAE JONES, JOHN P. JONES, ROBERT C. WOODARD, YARBOUGH B. KENNEDY, WILLIE L. DOTSON, FLORENCE JONES, LILLIAN F. JAMMER, BENJAMIN F. LEVISTON, AND VELMA L. SHELBY,

Plaintiffs,

VS.

THE SWEENY INDEPENDENT SCHOOL DISTRICT OF SWEENY, TEXAS, FRED MILLER, SUPERINTENDENT, DR. FLETCHER HESTER, WELDON BAILEY, E. H. WALLACE, TOM B. MAYS AND E. N. WINDLER, BOARD MEMBERS,

Defendants.

Jack Greenberg, James M. Nabrit, III, Conrad K. Harper, William B. Turner and W. Haywood Burns, of NAACP Legal Defense and Educational Fund, Inc., 10 Columbus Circle, New York, N.Y.; Weldon H. Berry, 618 Prairie Avenue, Houston, Texas; and Thomas H. Dent, 2517½ Market Street,

Galveston, Texas, of Dent, King, Cromwell and Wycliff, 4720 Dowling Street, Houston, Texas, for Plaintiffs.

Grant Cook of Reynolds, White, Allen & Cook, 1340 Tenneco Building, Houston, Texas, for Defendants.

JUDGMENT

This action having come on for trial before the Court, and a memorandum opinion and order of the Court having been filed,

IT IS HEREBY ORDERED that plaintiffs' second amended complaint be, and same is hereby, dismissed.

IT IS FURTHER ORDERED that all taxable costs be, and same are hereby, taxed against the plaintiffs.

DONE at Galveston, Texas, this the 6th day of June, 1969.

(Seal)

(Signed) JAMES NOEL
United States District Judge

APPENDIX G

MILDRED HARKLESS, ET AL, Plaintiffs,

v.

THE SWEENY INDEPENDENT SCHOOL DISTRICT, ET AL, Defendants.

Civ. A. No. 66-G-34.

United States District Court
S. D. Texas,
Galveston Division.
Jan. 19, 1968.

Weldon H. Berry, Houston, Tex., for plaintiffs.

Grant Cook, of Reynolds, White, Allen & Cook, Houston, Tex., for defendants.

MEMORANDUM AND ORDER

NOEL, District Judge.

Mildred Harkless and eleven other former teachers at the all negro George Washington Carver School, Sweeny, Texas, brought suit against the Sweeny Independent School District and the School Board pursuant to the provisions of Title 28, United States Code, Section 1343(3), alleging it to be a suit in equity authorized by Title 42, United States Code, Section 1983.

Plaintiff teachers allege in substance that they were not rehired for the school year 1966-67, when the School District completely integrated its school system, solely because they were negroes. The teachers prayed for a preliminary and permanent injunction requiring the de-

fendant Board and its employees to rehire them in accordance with their qualifications and experience, without regard to race or color, and to continue such practice without regard to plaintiffs' constitutionally protected activities in behalf of civil rights; that this court require defendants to reimburse plaintiffs for all back pay and other allowances which plaintiffs would have received but for their dismissal by the Sweeny Independent School District; and, that the plaintiffs be awarded costs and attorney fees.

In the pre-trial order signed by the court on December 13, 1966 after collaboration in preparation and approval by both counsel, the parties agreed to set the case on the court's non-jury docket. At the pre-trial conference held on November 16, 1967, plaintiffs' motion to amend the complaint was granted, the motion itself here being deemed the amended complaint. Leave was also granted plaintiffs' counsel to submit a supplemental pre-trial order to conform to the amended complaint.

In this amended complaint, plaintiffs allege they were denied due process of law under the Fourteenth Amendment to the United States Constitution by virtue of the procedures used by defendants in not rehiring them. The same prayer for relief was inserted in the amended complaint by incorporating the original complaint by reference. The plaintiffs also indicated that this issue would be presented as both a contested issue of fact and a contested issue of law in the supplemental pre-trial order to be submitted by February 1, 1968.

On November 20, 1967, defendants filed a demand for trial by jury for the entire suit, or in the alternative, a demand for trial by jury on new issues raised by plaintiffs'

amended complaint. Plaintiffs moved to strike defendants' demands for trial by jury. Plaintiffs and defendants having submitted briefs, plaintiffs' motion to strike defendants' jury demand is now before the court for decision.

Plaintiffs oppose defendants' jury demands on two broad grounds. First, plaintiffs claim that defendants waived their right to a jury trial; and second, that none of the issues framed by the pleadings are properly triable by the jury.

In connection with plaintiffs' contention that defendants waived whatever rights to jury trial they might otherwise have had by failing to make timely demand, an analysis must be made of the applicable Federal Rules of Civil Procedure. Rule 38(d) provides for automatic waiver of trial by jury upon the failure of the claiming party to make demand in accordance with Rule 38(b). Under Rule 38(b) "Any party may demand a trial by jury * * * by serving upon the other parties a demand therefor in writing * * * not later than 10 days after the service of the last pleading directed to such issue."

It is undisputed that as to the issues raised in the original complaint, the jury demand was untimely. The court recognizes that it may, in its discretion, grant a jury on appropriate issues, notwithstanding waiver. Rule 39(b), Federal Rules of Civil Procedure. Swofford v. B & W, Inc., 336 F.2d 406, 409 (5th Cir. 1964). But here, there was more than a mere inadvertent and untimely waiver, and it is clear that the right to a jury trial may be waived by agreement of the parties.[1] In the pre-trial order

1. Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., 137 F.2d 176 (5th Cir. 1943); affirmed 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944). See 2B Barron and Holtzoff, Federal Practice and Procedure § 879 (Wright ed. 1961).

signed by the court, after approval of counsel, the case was set down on the non-jury docket. Defendants knowingly and deliberately consented to the waiver in writing and have not laid a proper predicate for, or requested this court to exercise its discretion favorably to them by granting a jury trial pursuant to Rule 39(b). Therefore, as to the issues raised in the original complaint, the jury demand being untimely, will be struck.

However, it is also undisputed that defendants' jury demand was made within ten days of the filing of the amended complaint and therefore timely made under the requirement of Rule 38(b). Because of the lofty position occupied by the jury in our history and jurisprudence, and feeling strongly, as I do, that a trial before a jury should be denied with great caution, the applicable background authorities will be reviewed before analyzing the amended complaint to determine which of the issues, if any, must be submitted to the jury.

The right to a trial by jury in a federal court as declared by the Seventh Amendment is a basic and fundamental feature of our system of jurisprudence. At the time of its adoption, the Seventh Amendment's mandate presented far fewer problems than today. At that time the separate jurisdictions of common law and equity flourished. Each jurisdiction was equipped with its traditional fact-finding tool, the jury at law and the chancellor at equity. Since the jurisdictions of law and equity were mutually exclusive, legal actions were tried at common law, and equitable actions were tried in equity where special remedies were available. Because a given lawsuit would be tried either at common law or at equity, depending upon its nature, the problem of overlapping of fact-finding methods did not exist.

But with the abolition of the procedural distinction between law and equity in the federal courts by the adoption of the Federal Rules of Civil Procedure in 1938, came the sometimes difficult task of determining the proper fact-finding method in a given case. With the union of law and equity, all issues, whether legal or equitable, are required to be presented in one lawsuit, but a distinction still remains between jury and non-jury issues. Thus, in the federal courts, those issues which were traditionally legal, which would have been triable by jury at common law, must still be tried by jury where the proper party does not waive the right. Swofford v. B & W, Inc., 34 F.R.D. 15 (S.D. Tex., 1963).

The jurisdiction of the equity courts of old was dependent on the absence of an adequate remedy at law. If, under the circumstances, legal damages were sufficient to remedy the injury, the equity courts would refuse to grant equitable relief, and the plaintiff would have to be content with trial of his case at law, where facts could be found by jury. If, on the other hand, the injured party could only be made whole by injunction or other equitable relief, he would take his case to the chancery courts where the facts were determined by the judge or chancellor. Because of this historical background, one of the most useful indicia of the legal-equitable nature of a present-day civil action is the remedy requested in the pleadings. A request solely for equitable relief indicates a case traditionally triable in equity without the use of a jury. Likewise, a request solely for a legal remedy characterizes the case as one which would have been tried at common law where the jury was available.[2]

2. See 5 Moore, Federal Practice 159 (1951).

But under the present practice both legal and equitable remedies may be requested and obtained in a single civil action. Prior to 1959 there was some confusion as to the proper standard to apply in such a case to determine the propriety of jury trials; usually the courts sought to determine whether the "basic nature" of the case taken as a whole was legal or equitable. Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 489 (5th Cir. 1961). See e.g., Crane Co. v. Crane Heating Co., 157 F.Supp. 293 (N.D.Ga.1957). Thus, money damage claims if characterized as "incidental" to the basic equitable cause of action did not rise to a trial by jury on that issue. Crane Co. v. Crane Heating Co., supra. But in 1959 the Supreme Court held in Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed2d 988 (1959), that where legal and equitable issues are present in the same case, the trial court's discretion "is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510, 79 S.Ct. at 956. The court concluded that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 511, 79 S.Ct. at 957. Subsequently, the Court of Appeals for the Fifth Circuit in Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., supra, explained the holding of the Supreme Court in *Beacon Theaters* as follows:

> "It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control." 294 F.2d at 491.

The court in *Thermo-Stitch* also forecast that the *Beacon Theaters* case would sharply reduce the range of cases in which trial by the court without a jury might be held.[3]

The *Beacon Theaters* view was strengthened and reiterated in Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed2d 44 (1962). Jury trial was said to be required for any legal issue, notwithstanding the trial judge's characterization thereof as "incidental to equitable issues." 369 U.S. at 470, 82 S.Ct. 894, 8 L.Ed.2d 144. The court in *Dairy Queen* held that a defendant was entitled to a trial by jury on issues involved in a claim for a money judgment even though the wording in the complaint was historically equitable in nature.[4]

Thus, under the above clear and express language of the most recent discussion of the United States Supreme Court on this issue, this court will grant jury trial on the legal issues raised in the amended complaint, if any, for there has been no showing of "imperative circumstances" requiring a predetermination of any equitable issue. Although this suit is characterized as a suit in equity by plaintiffs, and is a civil rights suit, the operation of the Seventh Amendment cannot be suspended in the absence of "imperative circumstances" supra. In this regard, a civil rights suit is to be treated no differently than any other civil action.

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3. This view is endorsed in 2B Barron and Holtzoff, Federal Practice and Procedure § 872 (Wright ed. 1961), where the author states that the Supreme Court intends to require a substantial expansion of jury trial in areas where heretofore a jury has been thought unnecessary.

4. The action was the purely equitable action for an accounting. Since there was a claim for money damages arising from the accounting action, the Court in effect stripped the former exclusively equitable connotation from an action for an accounting.

A careful analysis will be made, in view of this background, to determine which of the issues of the amended complaint, if any, are properly triable by jury. In the amended complaint plaintiffs allege they were denied due process of law under the Fourteenth Amendment of the United States Constitution by virtue of the procedures used by defendants in not rehiring them. The remedies sought are the same as were sought in their original complaint, i.e. (1) a preliminary and permanent injunction; (2) a monetary award of back pay and other allowances; (3) costs and attorneys fees against defendants. Defendants deny that plaintiffs' race had anything to do with the plaintiffs not being rehired.

Those portions of the plaintiffs' prayer which concern costs and attorney fees may be disposed of summarily for they are never within the province of the jury. Swofford v. B & W Inc., supra; Rule 54(d), Federal Rules of Civil Procedure.

The prayer for a preliminary and permanent injunction is drawn in traditionally equitable language. However, the facts which must be found before the granting of the extraordinary relief prayed for are directly related to, and are virtually the same as, would support the claim for back pay and other allowances. The fact-finding aspect of the equitable issues must await a jury determination of whether race was a factor in plaintiffs' not being rehired if legal issues requiring that determination are present.

Back pay as damages was formerly characterized as merely incidental to the equitable remedy and did not carry with it a right to jury trial. NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893

(1937), Agwilines, Inc. v. NLRB, 87 F.2d 146, 151 (5th Cir. 1936).[5] But the rule is now to the contrary. No longer can the right to a jury trial be thwarted by a characterization of the claim for damages as "incidental" to the request for equitable relief. Dairy Queen v. Wood, supra.

Therefore, defendants' demand for jury trial will be granted as to those questions of fact germane to the request for back pay and other allowances in the amended complaint: Namely, whether plaintiffs were not rehired solely due to their race in violation of the due process clause of the Fourteenth Amendment and, if so, the appropriate amount of damages therefor. The remaining requests for relief, i.e., injunctions, costs, and attorneys' fees will be determined by the court in the light of the relevant jury findings.[6]

It is so ordered.

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5. Note that these cases predated the adoption of the Federal Rules of Civil Procedure and the *Beacon Theaters* and *Dairy Queen* cases. In the only civil rights opinion on this point since *Dairy Queen*, supra, Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 n.8 (4th Cir. 1966), this outdated argument was upheld. However, it is obvious from a close reading of the case that the points raised in *Beacon Theaters*, and *Dairy Queen*, were not brought to the attention of the court, hence the cursory treatment afforded the issue of back pay in a footnote.

6. The jury issues will be decided before the equitable issues. Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 511, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).

APPENDIX H

Cases which have followed *Monroe vs. Pape* in holding that a political subdivision is not a "person" within the meaning of 42 U.S.C. 1983

UNITED STATES SUPREME COURT DECISIONS

Case	*Type of Relief Sought*	*Entities Held Not Subject to Section 1983*
Egan vs. City of Aurora, 365 U.S. 514 (1961)	Damages	City

CIRCUIT COURT DECISIONS

Case	*Type of Relief Sought*	*Entities Held Not Subject to Section 1983*
Bennett vs. People of State of California, 406 F.2d 36, 39 (9 Cir. 1969)	Damages & Injunction	State & State Agencies
Diamond vs. Pitchess, 411 F.2d 565, 567 (9 Cir. 1969)	Damages & Injunction	State & County
Finley vs. Rittenhouse, 416 F.2d 1186, 1187 (9 Cir. 1969)	Damages	City, County & State
Gittlemaker vs. Philadelphia County, 413 F.2d 84, 86 (3 Cir. 1969)	Damages	City & City Owned Hospital
Rosado vs. Wyman, 414 F.2d 170, 178 (2 Cir. 1969)	Injunction & Declaratory Judgment	State Agency
Bright vs. Bishop, 398 F.2d 804, 805 (9 Cir. 1968)	Damages	City
City of Boulder vs. Snyder, 396 F.2d 853, 857 (10 Cir. 1968) cert. den. 393 U.S. 1051	Damages	Municipalities
Dodd vs. Spokane County, Washington, 393 F.2d 330, 334 (9 Cir. 1968)	Damages	"A local unit of government" & Counties
Brown vs. Town of Caliente, Nevada, 392 F.2d 546 (9 Cir. 1968)	Damages	Town & County

Case	*Type of Relief Sought*	*Entities Held Not Subject to Section 1983*
Deane Hill Country Club, Inc. vs. City of Knoxville, 379 F.2d 321, 324 (6 Cir. 1967)	Injunction	City
Loux vs. Rhay, 375 F.2d 55, 58 (9 Cir. 1967)	Damages	State
Ocasio vs. Bryan, 374 F.2d 11, 13 (3 Cir. 1967)	Damages	Municipal Corporation
Mayhue vs. City of Plantation Florida, 375 F.2d 447, 451- 452 (5 Cir. 1967)	Injunction & Damages	City
Blume vs. City of Deland, 358 F.2d 698, 699 (5 Cir. 1966)	Damages	City
Clark vs. State of Washington, 366 F.2d 678, 681 (9 Cir. 1966)	Injunction & Damages	State & State Bar Association
Wallach vs. City of Pagedale, Missouri, 359 F.2d 57, 59 (8 Cir. 1966)	Injunction & Damages	Municipality
Williford vs. People of California, 352 F.2d 474, 476 (9 Cir. 1965)	Injunction & Damages	"Municipal Corporation" "Political subdivision" & State
U. S. ex rel. Lee vs. Illinois, 343 F.2d 120 (7 Cir. 1965)	Damages	City Police Department & State
Harvey vs. Sadler, 331 F.2d 387, 390 (9 Cir. 1964)	Damages	School District
Sires vs. Cole, 320 F.2d 877, 879 (9 Cir. 1963)	Damages	County & Municipal Corporations
Fisher vs. City of New York, 312 F. 2d 890, 891 (2 Cir. 1963) cert. den. 374 U.S. 828	Damages	City
Spampinato vs. City of New York, 311 F.2d 439, 440 (2 Cir. 1962) cert. den. 372 U.S. 980	Damages	City
United States vs. Alabama, 267 F.2d 808, 812 (5 Cir. 1959)	Injunction	State

Case	*Type of Relief Sought*	*Entities Held Not Subject to Section 1983*
Agnew vs. City of Compton, 239 F. 2d 226, 230 (9 Cir. 1957) (Before *Monroe*)	Injunction, Damages & Declaratory Judgment	City
Cobb vs. City of Malden, 202 F.2d 701, 703 (1 Cir. 1953) (Before *Monroe*)	Injunction & Damages	City & School District
Charlton vs. City of Hialeah, 188 F. 2d 421, 422-423 (5 Cir. 1951)	Damages	City
Hewitt vs. City of Jacksonville, 188 F.2d 423, 424 (5 Cir. 1951)	Damages	City & Superintendent of its Prison Farm

DISTRICT COURT DECISIONS

Case	*Type of Relief Sought*	*Entities Held Not Subject to Section 1983*
Bonner vs. Texas City Independent School District, 305 F.Supp. 600, 616 (S.D. Texas 1969)	Reinstatement by Injunction & back pay	School District
Patton vs. Bennett, 304 F.Supp. 297, 299 (E.D. Tenn. 1969)	Injunction & Damages	School Board
Romer vs. Leary, 305 F.Supp. 366, 368 (S.D. N.Y. 1969)	Reinstatement by Injunction	City
Sanberg vs. Daley, 306 F.Supp. 277, 278 (N.D. Ill. 1969)	Damages	City
Schwartz vs. Galveston Independent School District, 309 F.Supp. 1034, 1037-1039 (S.D. Texas 1969)	Injunction	School District
State of Tennessee ex rel. Davis vs. Hartman, 306 F.Supp. 610, 612-613 (E.D. Tenn. 1969)	Damages	County & County Board
United States ex rel. Armstead vs. Pennsylvania, 303 F.Supp. 278, 279 (E.D. Pa. 1969)	Discharge From Confinement	State & County

Case	*Type of Relief Sought*	*Entities Held Not Subject to Section 1983*
United States ex rel. Washington vs. Chester Co. Police Dept., 294 F. Supp. 1157 (E.D. Pa. 1969)	Damages	City & City Police Dept.
In re Flowers, 292 F.Supp. 390, 391 (E.D. Wis. 1968)	Damages	State
King vs. McGinnis, 289 F.Supp., 466, 468 (S.D. N.Y. 1968)	Damages	State & State Agency
United States ex rel. Watson vs. Commonwealth of Pa., 289 F. Supp. 797 (E.D. Pa. 1968)	Injunction	State
Link vs. Greyhound Corporation, 288 F.Supp. 898, 899 (E.D. Mich. 1968)	Damages	Municipal Corporations & "Other Political Subdivisions including counties"
Glancy vs. Parole Board of Michigan Dept. of Corrections, 287 F.Supp. 34, 36 (W.D. Mich. 1968)	Injunction & Declaratory Judgment	State Parole Board & Department of Corrections
Sutton vs. City of Philadelphia, Commonwealth of Pa., 286 F. Supp. 143, 145 (S.D. N.Y. 1968)	Injunction	City & State
Israel vs. City Rent & Rehab. Admin. of City of New York, 285 F.Supp. 908, 911 (S.D. N.Y. 1968)	Injunction	City & Municipal Agency
Johnson vs. Hackett, 284 F.Supp. 933, 936 (E.D. Pa. 1968)	Injunction & Damages	Town Board of Commissioners
United States vs. Commonwealth of Pennsylvania, 281 F.Supp. 175, 178 (E.D. Pa. 1968)	Damages	State & Municipal Corporation
Baxter vs. Parker, 281 F.Supp. 115 (N.D. Fla. 1968)	Damages	"Governmental Subdivision"
Fowler vs. United States, 258 F. Supp. 638, 646 (C.D. Calif. 1966)	Damages & Injunction	State "Or its Governmental Subdivisions"
Broome vs. Simon, 255 F.Supp. 434, 440 (W.D. La. 1966)	Injunction & Damages	United States Government

Case	*Type of Relief Sought*	*Entities Held Not Subject to Section 1983*
McArthur vs. Pennington, 253 F. Supp. 420, 421 (E.D. Tenn. 1963)	Damages	City
Spiesel vs. City of New York, 239 F. Supp. 106, 107 (S.D. N.Y. 1964)	Damages	Municipal Corporation
Haigh vs. Snidow, 231 F.Supp. 324, 325 (S.D. Calif. 1964)	Damages	County
Scolnick vs. Winston, 219 F.Supp. 836, 839 (S.D. N.Y. 1963)	Damages	City
Roberts vs. Trapnell, 213 F. Supp. 47, 48 (E.D. Pa. 1962)	Damages	Township & Township Trustees
Graves vs. City of Bolivar, 154 F. Supp. 625, 626 (W.D. Mo. 1957) (Before *Monroe*)	Damages	City
Brown vs. City of Wisner, La., 122 F.Supp. 736, 739 (W.D. La. 1954) (Before *Monroe*)	Damages	City

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 561

SWEENY INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

MILDRED HARKLESS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

Since the filing of the petition for a writ of certiorari, the opinion of the United States Court of Appeals for the Fifth Circuit and the dissenting opinion of Judge Jones have been reported at 427 F.2d 319, 324.

Questions Presented

1. Under 42 U.S.C. §1983 and the Fourteenth Amendment may equitable relief, including back pay for black teachers discriminatorily not rehired because of school desegregation, be awarded against a school district's board of trustees and superintendent sued only in their official capacities?

2. Assuming *arguendo* that school officials are liable to equitable remedies under 42 U.S.C. §1983 for racial discrimination, should certiorari be granted to decide whether the school district is also liable?

3. Assuming *arguendo* that school officials are liable to equitable remedies under 42 U.S.C. §1983 for racial discrimination, should certiorari be granted to decide whether the Fourteenth Amendment, together with 28 U.S.C. §1343(3) or 28 U.S.C. §1331, authorize this action independent of 42 U.S.C. §1983?

4. Should certiorari be granted on the issue of jury trial where:

(a) The Fifth Circuit, for the district court's guidance, reversed the grant of jury trial in an equitable action;

(b) pending motions in the district court may moot the jury trial issue;

(c) the jury trial issue is not clearly presented because the district court denied motions which, if reviewed here, would likely dispose of this case on the grounds that the arguable bases for jury trial no longer existed or the demand for jury trial was untimely?

Constitutional and Statutory Provisions Involved

This case involves the First, Seventh and Fourteenth Amendments to the United States Constitution. This case also involves the following statutes:

28 U.S.C. §1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in contro-

versy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set off or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1343(3).

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement

Respondents are ten black teachers who were not rehired for the 1966-67 school year by the Sweeny Independent School District. The instant action, charging racial discrimination, was filed May 23, 1966, seeking the equitable remedies of injunctive relief and back pay in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. §1343(3), 42 U.S.C. §1983, and the Fourteenth Amendment (A. 1-14, 61-62, 83-84, 206-18).[1]

Respondent black teachers named as defendants the school district, the superintendent of schools, and the members of the district's board of trustees in both their individual and official capacities. But at the time of *voir dire* examination of the jury panel[2] on March 3, 1969, and because of the unwillingness of some members of the panel to assess a monetary award against the defendants individually (A. 224-40), respondents' counsel moved to dismiss the official defendants in their individual capacities (A. 232). The motion was granted leaving as defendants only the school district and the individual defendants in their official capacities (A. 237-39).

Subsequently, during trial, and in response to a suggestion by the district court that because of *Monroe* v. *Pape*, 365 U.S. 167 (1961) subject matter jurisdiction over the remaining defendants might be lacking, petitioners moved to dismiss on this ground (A. 244-49, 253-54). On March 13, 1969, the case was submitted to the jury on special

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[1] Citations are to the Appendix filed in the Fifth Circuit.

[2] Respondents consistently and repeatedly objected to the grant of jury trial in this case (*e.g.*, A. 71) or sought to remove any colorable basis for granting jury trial by dismissing a portion of the complaint (*e.g.*, A. 84-86, 89-95, 249-52). The district court, nonetheless, granted jury trial and denied leave to respondents for an interlocutory appeal (A. 80-83, 99-100, 114-116). The issues concerning jury trial are treated in greater detail, *infra* at pp. 11-12.

interrogatories and the jury rendered a verdict.[3] But the district court, on June 6, 1969, dismissed the second amended complaint without resolving any other issues on the grounds that *Monroe* v. *Pape, supra,* did not permit recovery against the school district and its officials sued in their official capacities.

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[3] The jury found that (A. 118-23):

Question Number 1: Do you find from a preponderance of the evidence that any plaintiff's race (Negro) was a factor in the failure of the Board of Trustees of The Sweeny Independent School District to offer re-employment for the school year 1966-67?

Answer: "No"

Question Number 2A: Do you find from a preponderance of the evidence the Board of Trustees of the District, on the occasion of its regular meeting of March 8, 1966, or at any time prior thereto, decided that the professional (teaching) staff of the system (District) would have to be reduced as a result of desegregation?

Answer: "Yes"

Question Number 2B: If, but only if, you have answered Question Number 2A "Yes", you will answer this question: Do you find from a preponderance of the evidence that when the Board determined at the March 8, 1966 meeting not to offer plaintiffs re-employment for the school year 1966-67, the qualifications of any plaintiff to teach in the District was not and had not been fairly and impartially evaluated and compared with the qualifications of all other teachers who taught in the system (District) during school year 1965-66, without consideration of the fact such plaintiff was a Negro?

Answer: "No"

Question Number 3A: It is undisputed in the record that after March 8, 1966 the Board of Trustees decided to recruit new teachers from outside the system (not employed by the District during 1965-66), to fill vacancies for the year 1966-67 created by the displacement of teaching staff resulting from desegregation. Bearing this in mind, do you find from a preponderance of the evidence that before filling any such va-

On appeal, the United States Court of Appeals for the Fifth Circuit, on June 2, 1970, reversed, 2-1, holding that a school district and its officials are liable to suit under 42 U.S.C. §1983 and that in an equitable action for injunctive relief and back pay, jury trial is not required.

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cancy, the Board failed to determine that any plaintiff was not qualified to fill any such vacancy?

Answer: "No"

Question Number 3B: With respect to any plaintiff whose name you have written in the space next above provided, do you find from a preponderance of the evidence that the Board failed to evaluate the qualifications of such plaintiff to fill such vacancy fairly and impartially?

Answer: No Answer

Question Number 4: Do you find from a preponderance of the evidence that the Superintendent Fred Miller and the Board of Trustees acted in good faith at all times and in every respect in the process of the Board's decision not to offer any plaintiff re-employment for the school year 1966-67?

Answer: "Yes"

Question Number 5: Do you find from a preponderance of the evidence that a factor relied upon by the Board in reaching its decision not to offer any plaintiff re-employment for the year 1966-67 after the filing of this law suit on May 23, 1966, was the fact that any such plaintiff was a party to this law suit?

Answer: "Yes"

If you have answered this Question Number 5 "Yes", then in the space next provided write the name of each plaintiff with respect to which you have so found; but, if you have answered the question "No", you will not write any name in such space.

Mildred Harkless, John P. Jones, Robert C. Woodard, Willie Dotson, Lillian F. Jammer, Benjamin F. Leviston and Velma L. Shelby

REASONS FOR DENYING THE WRIT

I.

Review by This Court Is Unnecessary Where It Is Now Well Settled That School Officials Are Subject to 42 U.S.C. §1983.

At least since *Brown* v. *Board of Education*, 347 U.S. 483 (1954) it has been clear that 42 U.S.C. §1983 grants a right of action for the racially discriminatory conduct of school officials. Petitioners' argument to the contrary is both frivolous and revolutionary (see Petition for a Writ of Certiorari at 10-11). Petitioners assert that *Monroe* v. *Pape*, 365 U.S. 167 (1961)—a case not involving equitable relief for official racial discrimination—somehow reduced the power of federal courts to curb racially discriminatory school boards. *Monroe* merely held that the city of Chicago was not liable in *damages*, in a respondeat superior context, for the torts of its police officers. We agree with the Court of Appeals that footnote 50 of the *Monroe* opinion, 365 U.S. at 191, means that earlier cases decided by this Court allowing equitable relief against municipalities do not permit the inference, after *Monroe*, that damage actions may be maintained against municipalities under the doctrine of respondeat superior. 427 F.2d at 322. Similarly, officials not personally involved in deprivation of civil rights are also not subject to § 1983. *Salazar* v. *Dowd*, 256 F. Supp. 220, 223 (D. Colo. 1966); *Sanberg* v. *Daley*, 306 F. Supp. 277 (N.D. Ill. 1969). The instant case is one, however, where respondeat superior is not at issue since the school board members named as defendants were the officials who actually refused to rehire respondent black teachers.

This Court has repeatedly exercised its power over state officials sued *only* in their official capacities under § 1983

or the Fourteenth Amendment.[4] *E.g., Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (state attorney general);[5] *Baker* v. *Carr*, 369 U.S. 186 (1962) (state officials, including the secretary of state and the attorney general);[6] *Reynolds* v. v. *Sims*, 377 U.S. 533, 537 (1964) (state election officials); *WMCA* v. *Lorenzo*, 377 U.S. 633, 635 (1964) (state election officials); *Davis* v. *Mann*, 377 U.S. 678, 680 (1964) (state election officials); *Griffin* v. *County School Board*, 377 U.S. 218, 228 (1964) (county board of supervisors);[7] *Rinaldi* v.

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[4] Significantly in *Nixon* v. *Herndon*, 273 U.S. 536 (1927) Mr. Justice Holmes, writing for the Court, held that the Fourteenth Amendment forbids state court judges to bar blacks from voting in a Democratic primary election as required by state statute. The action was brought against the judges of elections for damages of $5000. 273 U.S. at 539. The amended petition, founded upon the predecessor of §1983 and other statutes (R. at 4-5), sought relief against the officials *only* as officials (R. at 3):

> The amended petition sought ". . . to redress an injury which he [plaintiff] sustained by reason of the acts of defendants *in their official capacities* discriminating against him by reason of his race and color, in violation of the constitution and laws of United States." (emphasis supplied)

In their motion to dismiss the defendant judges raised claims, *inter alia*, of failure to state a cause of action and the court's inability to grant relief (R. at 8); the motion to dismiss was sustained and the cause dismissed (R. at 9). This dismissal was, of course, reversed by this Court in *Nixon* v. *Herndon*, *supra*.

[5] The state attorney general was sued only in his official capacity as is made clear in the following papers contained in the *Young* record on file in this Court: Petitioner's Petition for Writs of Habeas Corpus and Certiorari and Motion for Leave to file, at 8, 15 (copy of original bill of complaint annexed to Petition); Petitioner's Brief on Hearing of Rule to Show Cause, at 6-8.

[6] Record, at 5, *Baker* v. *Carr*, 369 U.S. 186 (1962).

[7] The district court below misapprehended the importance of the *Griffin* holding by erroneously asserting *Griffin* was not a §1983 case. 300 F. Supp. at 805. But *Griffin* did in fact arise under the Act of April 20, 1871, now codified in part and 42 U.S.C. §1983. The *Griffin* litigation began in 1961 by the filing of an amended supplemental complaint in *Davis* v. *County School Board*, decided *sub nom. Brown* v. *Board of Education*, 347 U.S. 483 (1954). The

Yeager, 384 U.S. 305 (1966) (state prison officials and county treasurer).[8] Nor must it be forgotten that in *Monroe* itself, it was the *City of Chicago*, not any of its officials, which was held not subject to damages under § 1983.

In view of this list of precedents before and after *Monroe*, petitioners take two position: (1) this Court did not mention *Monroe* in those cases postdating 1961; and (2) several lower federal courts have held officials not subject to § 1983. (Petition for a Writ of Certiorari at 10-12.) The first position perpetuates a misunderstanding of what *Monroe* held. It is not necessary for this Court to mention *Monroe* in cases where it does not apply. Since *Monroe* involved a municipality sued for damages as respondeat superior, its holding does not affect claims for injunctive and monetary relief against officials sued in their official capacities for their own acts, as in *Rinaldi;* nor does *Monroe's* holding affect claims for equitable relief against officials sued in their official capacities to enjoin those officials from acting unconstitutionally as in *Baker* v. *Carr, Reynolds* v. *Sims, WMCA* v. *Lomenzo, Davis* v. *Mann,* and *Griffin.*

Petitioners' second position—*i.e.*, that 55 federal cases have concluded contrary to the Fifth Circuit, that § 1983 does not apply to officials—involves imprecision as to the holdings of those cases. Only one of the 55 cases is in point because it involved, as here, equitable relief from racial discrimination by officials not sued as respondeat superior.

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amended supplemental complaint—while adding new parties such as the county board of supervisors—did not disturb the original statutory basis of the action, i.e., §1983. *Davis* Record at 5, *Brown* v. *Board of Education*, 347 U.S. 483 (1954); Record at 20, *Griffin* v. *County School Board*, 377 U.S. 218 (1964).

[8] In *Rinaldi*, the officials specifically claimed by way of defense that the acts complained of were done in their official capacities. Record at 1, 13-16, *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966).

This case[9] was decided subsequent to the district court opinion below by the same district court judge whose decision in the instant case was reversed by the Fifth Circuit. The other 54 cases did not involve non-vicarious liability in equity for official racial discrimination. For this reason, petitioners have shown no conflict between the Fifth Circuit's opinion below and other federal courts. In short, the Fifth Circuit was plainly right in holding school officials liable for racial discrimination.

II.

Certiorari Should Be Denied Because the Issue Whether a School District Is Liable Under 42 U.S.C. §1983 Is Premature.

In view of the well-settled law, set out in Argument I, that school officials are liable under 42 U.S.C. § 1983 for racial discrimination, it is premature for this Court to reach the question whether a school district is also liable. This is so because equitable relief against the school officials would, as a practical matter, satisfy the claims of respondent black teachers and make academic the issue of school district liability. While it was proper for the Fifth Circuit to decide the question of school district liability for the guidance of the district court, this Court does not sit to render advisory opinions; therefore the issue of school district liability need not be faced here. *See, e.g., Daniel* v. *Paul,* 395 U.S. 298, 300 n. 1 (1969).[10]

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[9] *Bonner* v. *Texas City Independent School District,* 305 F. Supp. 600, 616 (S.D. Tex. 1969).

[10] For essentially similar reasons—and the added fact that the Fifth Circuit did not reach the question—it is also unnecessary for this Court to decide whether the Fourteenth Amendment together with 28 U.S.C. §1343(3) or 28 U.S.C. §1331 authorize this action independent of 42 U.S.C. §1983.

III.

Certiorari Should Be Denied Because the Issue Whether Jury Trial Was Properly Granted Is Premature and May Be Mooted.

For the guidance of the district court, which dismissed the complaint without reliance on the verdict, the Fifth Circuit below also held that jury trial had been erroneously granted. This issue, brought to this Court's attention by petitioners, is premature for these reasons: (a) since the Fifth Circuit predicated reversal upon the well-settled law discussed in Argument I, other grounds for the Fifth Circuit's action need not be faced here; (b) the jury trial issue may be mooted by subsequent district court proceedings; (c) the jury trial issue is not clearly presented on this record. The first of these reasons is self-evident and it also applies to other issues in this case discussed in Argument II, *supra*. The second of these reasons rests upon the fact that the special verdict set out *supra* at pp. 5-6, n. 3, is arguably construable for seven of the ten respondents or for the petitioners; consequently the district court can hardly enter judgment unclarified by its own findings. These findings may, in effect, render the verdict advisory and thus well within established equity practice. *See Hurwitz* v. *Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943); *Aetna Ins. Co.* v. *Paddock*, 301 F.2d 807 (5th Cir. 1962); *Wolff* v. *Calla*, 288 F. Supp. 891 (E.D. Pa. 1968), *Schetter* v. *Housing Authority of City of Erie*, 132 F. Supp. 149 (W.D. Pa. 1955). Furthermore, in the district court, respondent black teachers have pending motions for judgment n.o.v. and for new trial. If either of these motions is granted, the jury trial question is moot on this record.

Finally, the jury trial question is inextricably connected to respondent black teachers' right to dismiss that portion

of their second amended complaint arguably giving the right to jury trial (A. 71, 84-86, 89-95, 249-52) as well as the arguably untimely demand for jury trial by petitioners.[11] It is likely, therefore, that the right to jury trial cannot be decided on this record because of these factors; in which case, the certiorari jurisdiction should not be exercised.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

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[11] Petitioners waived their right to jury trial on the original complaint but demanded jury trial on the first amended complaint which did not change the relief sought but only added a due process of law theory to the equal protection of the laws claim in the original complaint (A. 61-63). Over respondents' objections, the district court permitted jury trial as to all issues merely because an additional theory had been added. 278 F. Supp. 637 (A. 95-100).